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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1799

MAHMOOD MOHAMMAD, M.D., CALVIN H. CURRY, JR., M.D., EDWIN D. CRANE, III, M.D., J. HOWARD GRINER, M.D., and H. HUTSON MESSER, M.D.,
Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,
Respondent.

PETITIONERS', MOHAMMAD, CURRY, CRANE, GRINER AND MESSER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANK J. SANTRY
Keen, O'Kelley, Field
& Ellis, P.A.
P.O. Box 1879
Tallahassee, Fla. 32302
Attorneys for Petitioners, Mohammad, Curry, Crane, and Griner

MURRAY M. WADSWORTH
Thompson, Wadsworth,
Messer & Rhodes
P.O. Box 1876
Tallahassee, Fla. 32302
Attorneys for Petitioner, Curry

J. LEWIS HALL, JR.
Hall & Booth
P.O. Drawer 804
Tallahassee, Fla. 32302
Attorneys for Petitioner, Messer

W. DEXTER DOUGLASS
Douglass, Davey & Cooper
P.O. Box 1674
Tallahassee, Fla. 32303
Attorneys for Petitioner, Griner

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OPINION BELOW

The opinion below is reported as *Feminist Women's Health Center, Inc. v. Mahmood Mohammad, M.D.*, 586 F.2d 530 (5th Cir. 1978). It appears at Appendix page 1a.

GROUNDS FOR SUPREME COURT JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, was rendered on December 20, 1978. Rehearing was denied on March 5, 1979. Jurisdiction is conferred on this Court by 28 U.S.C. §1254.

QUESTIONS PRESENTED

I. Did the Fifth Circuit err in determing that antitrust jurisdiction existed on the following factual basis:

1. The proximity of Tallahassee, Florida to the Georgia border.
2. Tallahassee's regional status as a health care center.
3. The Feminist Center's service to one hundred seventy-six non-Florida clients in twenty-six months generating $1,000.00 per month in gross receipts.

4. The Feminist Center's receipt of $26.00 per month from foreign insurance companies.

5. The Feminist Center's purchase of $477.00 per month in supplies from foreign sources.

6. The Feminist Center's purchase of $738.00 per month in supplies from Florida sources.

7. The Feminist Center's expenditure of $174.00 per month for foreign travel.

8. The steady increase in the Feminist Center's business during the alleged conspiracy?

II. Did the Fifth Circuit err in ruling that *potential* effect on the interstate commerce elements of respondent's business was sufficient to confer antitrust jurisdiction though no *actual* detrimental effect was demonstrated during a full evidentiary hearing?

III. Did the Fifth Circuit err in not extending Noerr-Pennington protections to petitioners' intra-hospital communications and to petitioners' communications with other components of Florida's statutory medical self-regulation scheme?

IV. Did the Fifth Circuit err in finding a triable issue regarding the application of the sham exception to petitioners' Noerr-Pennington protected communications with the Florida Board of Medical Examiners?

V. Did the Fifth Circuit err in reversing summary judgment for petitioners on the conspiracy to monopolize claim?

CONSTITUTIONAL PROVISION

U.S. Const. amend. I.

> **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.**

STATUTORY PROVISIONS

15 U.S.C. §1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

15 U.S.C. §2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Fla. Stat. ch. 395.065 (1975).

Hospital disciplinary powers —

(1) The medical staff of any hospital licensed pursuant to this chapter is authorized to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause, which shall include, but not be limited to:

(a) Incompetence.

(b) Negligence.

(c) Being found an habitual user of intoxicants or drugs to the extent that the physician is deemed dangerous to himself or others.

(d) Being found liable by a court of competent jurisdiction for medical malpractice.

However, the procedures for such actions shall comply with the standards outlined by the Joint Commission of Accreditation of Hospitals and the Principles of

Participation in the Federal Health Insurance Program for the Aged.

(2) There shall be no liability on the part of, and no cause of action of any nature shall arise against, any hospital, hospital medical staff, or hospital disciplinary body or its agents or employees for any action taken in good faith and without malice in carrying out the provisions of this section.

Fla. Stat. ch. 458.001 (1975).

Purpose— Recognizing that the practice of medicine is a privilege granted by legislative authority and is not a natural right of individuals, it is deemed necessary for the Legislature in the interest of public health, safety, and welfare to provide laws and provisions covering the granting of that privilege and its subsequent use, control, and regulation to the end that the public shall be properly protected against unprofessional, improper, unauthorized, and unqualified practice of medicine and from unprofessional conduct by persons licensed to practice medicine.

Fla. Stat. ch. 458.01 (1975).
Board of Medical Examiners; qualifications—

A board is established within the Division of Professions of the Department of Professional and Occupational Regulation to be known by the name and style of the "State Board of Medical Examiners;" said

board shall be composed of ten practicing physicians of integrity and ability, who shall be residents of, and duly licensed to practice medicine in this state, and who shall have graduated from reputable medical schools and have been engaged in the active practice of their profession within this state for at least a period of 5 years, but none of them shall be connected in any way with any medical college; said board shall perform such duties and possess and exercise such powers relative to the protection of the public health and the control and regulation of the practice of medicine in the state as is prescribed and conferred upon it in this chapter.

Fla. Stat. ch. 458.04(1) (1975).
Organization of board; meetings—

(1) Immediately after the appointment and qualification of its members, the Board of Medical Examiners shall meet and organize. Said board shall elect a president, vice president, secretary, and treasurer from its membership. The office of secretary and treasurer may be held by one person. Members of the board shall receive $10 per day, or any part of a day, while attending official board meetings, not to exceed 12 meetings per year, and shall receive per diem and mileage as provided in s. 112.061, from place of their residence to place of meeting and return. The secretary shall be paid an annual salary of $1200.

Fla. Stat. ch. 458.1201 (1975).
Lengthy text appears in Appendix at page 69a.

STATEMENT OF THE CASE

Defendants - Petitioners, Mohammad, Crane, Curry, Griner and Messer petition for writ of certiorari to the United States Court of Appeals, Fifth Circuit, of that part of the Fifth Circuit's December 20, 1978 decision reversing the United State's District Court for the Northern District of Florida. For clarity, the substance of the Fifth Circuit's decision is outlined as follows:

The Court affirmed:

1. Finding of subject matter jurisdiction.

2. Application of Noerr-Pennington defense to petitioners' communication with the Florida Board of Medical Examiners and petitioners' post-suit communications with the Capital Medical Society.

3. Summary judgment for petitioners on state antitrust claim.

The Court reversed:

1. Application of Noerr-Pennington defense to intra-staff communications

of petitioners and pre-suit communications with the Capital Medical Society.

2. Application of Noerr-Pennington defense to petitioners' communications with the Jacksonville Hospital department chairman.

3. Summary judgment that respondent's evidence of sham was insufficient to overcome Noerr-Pennington protection of petitioners' communications with the Florida Board of Medical Examiners.

4. Summary judgment on state claim for tortious interference with contractual relations.

5. Summary judgment for petitioners on attempt to monopolize theory.

This suit arose out of the following facts:

Petitioners, Mohammad, Crane, Curry, Griner and Messer are licensed doctors practicing obstetrics and gynecology in Tallahassee, Florida. Doctors Curry and Griner are opposed to abortions and do not perform them. During the alleged conspiracy, Dr. Mohammad performed 7.8 abortions per month. Dr. Messer did 3.4;

and Dr. Crane did 3.5. During the same period, respondent center did over one hundred abortions per month. Respondent is a Florida non-profit corporation which derives income exclusively from fees for first trimester abortions. It opened for business in Tallahassee, Florida in June of 1974. From June of 1974 to September of 1976 the respondent performed abortions in Tallahassee for one hundred seventy-six clients from other states. This was 8% of respondent's total business. From June 1974 to April 1976 respondent purchased $477.00 per month in goods from foreign suppliers. From June of 1974 through July of 1976 respondent's employees spent $174.00 per month for foreign travel. From June 1974 through April 1976 respondent received a total of $562.00 in payment from foreign insurance companies. During the entire course of the alleged antitrust conspiracy respondent's business increased in number of clients and volume of income.

Petitioners' involvement with respondent began in May of 1974, one month prior to the center's opening in Tallahassee. Each of the petitioners-defendants to this suit, with the exception of Dr. George Palmer, is a member of the OB—GYN staff at Tallahassee Memorial Hospital (TMH). At the May 1974 meeting of that staff, Dr. Brickler, a non-party, announced that respondent's abortion center was coming to Tallahassee. Dr. Crane moved that the staff not approve such a clinic unless a member of the TMH staff was associated with it. The motion was an expression of concern that the clinic be

acceptably staffed by a physician who would be in Tallahassee to handle post-procedure emergencies.

In June 1974 Dr. Brickler began working at respondent's center one day a week to perform abortions and related care. Dr. Brickler also assumed responsibility for emergency aftercare of his Feminist Center Clinic patients. The center paid Dr. Brickler $35.00 per abortion and agreed with him not to advertise its abortion service. Dr. Brickler requested the latter condition so that women would not be encouraged to use abortion as a substitute for preventative measures to avoid unwanted pregnancies.

Dr. Brickler worked at the center without incident for one year. In April 1975, Dr. McWilliams, another non-party, joined Dr. Brickler in performing abortions at the center and sharing aftercare responsiblilties.

In June 1975, respondent's director called the Tallahassee daily newspaper and gave an interview resulting in a June 20, 1975 article. The article indicated that Dr. Brickler was performing abortions at the clinic for which he recieved $35.00. It quoted the center's director that most doctors who do abortions do them only for the money.

As a result of the article, Dr. Brickler resigned from the clinic the next day. Dr. McWilliams left one month later because of the controversy over the publicity and

because Dr. Brickler no longer shared the work load. In August 1975 residents in training at Jacksonville Hospital, a public hospital under Fla. Stat. ch. 395.065 (1975), began travelling 175 miles to Tallahassee to do abortions in respondent's clinic. The doctor would come to Tallahassee; do 20 to 40 abortions; and return to Jacksonville the same day. The doctor made no arrangements for post-abortion emergency aftercare. The Jacksonville physicians relied on respondent's assurances that it had arranged twenty-four hour coverage by local physicians for emergencies. Pretrial discovery established that respondent never developed a physician roster to assure emergency coverage. Rather, it relied on having patients go to the Tallahassee Memorial Hospital Emergency Room if complications developed.

The June 20, 1975 article called the center to the attention of the TMH obstetrical and gynecological staff. At the July 1, 1975 staff meeting at which petitioners except Curry were present, Dr. Brickler indicated he had resigned from the center. No physician indicated he was working at the center and the staff concluded that out of town doctors must be doing the abortions. The staff questioned the ethics of a physician advertising and concluded that physicians should not associate with organizations that advertise their medical services. The staff decided to bring the clinic's advertising to the attention of the Florida Board of Medical Examiners.

At the August 5, 1975 OB-GYN staff meeting a motion was adopted that the service write a letter to the Capital Medical Society, a component peer group under Fla. Stat. ch. 458.1201 (1975), expressing the view that physicians should not associate with organizations that advertise medical services. The letter was apparently never written.

As previously noted, residents in training from Jacksonville Hospital began working at the clinic in August of 1975. On August 29, the staff sent a letter to George Palmer[1], Executive Director of the Florida Board of Medical Examiners, indicating that out-of-town doctors were performing surgery at the Feminist Women's Health Center without adequate provisions for aftercare. The staff indicated this could be a violation of the Florida Medical Practices Act. Dr. Palmer, a full time state employee not engaged in private practice, was urged to take appropriate corrective measures.

Palmer acted on the complaint as required by law. He and a Board of Medical Examiners investigator visited respondent's clinic. They were advised that Jacksonville doctors were doing abortions and the clinic had arranged with Tallahassee Memorial Hospital to take care of post-surgical complications. Palmer later checked with Tallahassee Memorial Hospital and

1. Dr. Palmer has filed a companion petition seeking review of the Fifth Circuit's reversal of summary judgment in his favor.

discovered the center had no formal arrangement other than the public's routine access to the hospital's emergency room.

Dr. Palmer spoke by telephone to the Jacksonville physician then employed with the center. He advised the resident that his conduct was not illegal but that he viewed the aftercare arrangements as questionable.

Dr. Palmer reported his findings to the OB-GYN staff chairman, Dr. Mohammad.

At the September 2, 1975 meeting, the OB-GYN staff minutes reflect the staff voted to send a letter to the Jacksonville residents who were working at the clinic. On September 10 a letter was sent, not to the doctors, but to the chairman of the residency program in Jacksonville. The letter noted that Jacksonville Hospital residents were apparently doing abortions in Tallahassee without arrangements for meeting post-operative complications.

The Jacksonville residents, after consulting with their superiors and other advisers, decided not to continue to work at the clinic. Their decisions were based partly on problems with aftercare and partly on the existence of a clinic-physician controversy in Tallahassee.

Antitrust suit was filed against six members[2] of the OB-GYN staff and against the Executive Director of the Florida Board of Medical Examiners. After suit was filed, the Capital Medical Society passed a resolution supporting the doctors. Plaintiff-respondent's suit, in the United States District Court For the Northern District of Florida, alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1-2 (1970). Pendant state claims were also asserted. The petitioners denied the substantive allegations including subject matter jurisdiction. Cross-motions for summary judgment on jurisdiction were denied. The court ultimately conducted a full evidentiary hearing on jurisdiction and concluded it was properly invoked. Petitioners' motion to certify the order for interlocutory appeal was denied.

Exhaustive discovery was undertaken. During the course of the discovery defendant Palmer was granted summary judgment on September 3, 1976. After the conclusion of discovery the remaining defendant-petitioners moved for summary judgment. Hearing on those motions was conducted on November 30, 1976. The trial judge concluded that petitioners' actions were protected by the Noerr-Pennington doctrine and that the evidence viewed most favorably to the respondent was legally insufficient to avoid the constitutionally founded Noerr-Pennington protections. Summary judgment was awarded to the remaining petitioners on December 3, 1976. Respondent appealed the summary

2. One defendant, Dr. Knight, died during the pendency of the suit.

judgment to the United States Court of Appeals, Fifth Circuit. Petitioners Mohammad, Crane, Curry, Griner and Messer cross-appealed on the issue of subject matter jurisdiction. On December 20, 1978 the Fifth Circuit rendered its decision affirming in part and reversing in part. Petitioners seek a writ of certiorari to review this decision.

BASIS OF DISTRICT COURT JURISDICTION

The causes of action asserted include violations of the Sherman Act, 15 U.S.C. §§1-2, alleging jurisdiction under the Clayton Act, 15 U.S.C. §§15, 26, for damages and injunctive relief. *See also,* 28 U.S.C. §1337.

ARGUMENT

I. DID THE FIFTH CIRCUIT ERR IN DETERMINING THAT ANTITRUST JURISDICTION EXISTED ON THE FACTUAL BASIS ASSERTED?

Before discussing the standard, it should be emphasized that subject matter jurisdiction was not determined summarily. The Court conducted a complete evidentiary hearing affording respondent the opportunity to present all the evidence it had supporting its claim of interstate commerce nexus and impact.

Alternative tests for Sherman Act jurisdiction have been devised by the courts to determine whether a contract, combination or conspiracy restrains trade "among the several states".

The Act vests the court with jurisdiction if:

1. The conduct complained of occurs within the flow of interstate commerce; or,

2. The conduct complained of occurs wholly on the local level but substantially affects interstate commerce. *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F. 2d 732 (9th Cir. 1954).

The petitioners in this action all reside and practice medicine in Leon County, Florida. Respondent's abortion business is conducted exclusively at a single location in Leon County. Respondent sells no products. Only the "effects on commerce" test is applicable. The quantum of interstate involvement adduced at the full evidentiary hearing on jurisdiction is insufficient to support Sherman Act jurisdiction even if it was affected by petitioners' alleged conduct.[3].

Reduced to its most elemental level, respondent's monthly interstate commerce involvement is as follows:

Treatment of non-Florida clients	$1,000.00
Receipts from foreign insurance companies	26.00
Purchase of foreign supplies	477.00
Employee foreign travel	174.00
Total:	$1,677.00

The Fifth Circuit cited two cases as authority that less significant commerce contacts than those noted

3. The requirement of an actual effect on interstate commerce is discussed in Point II.

above had supported Sherman Act jurisdiction. Petitioners respectfully disagree with the court's reading of those cases.

In *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F. 2d 934 (5th Cir. 1975), the product which was the object of territorial restraint was beer moving in interstate commerce. The "in commerce" test was applied rendering quantitative analysis unnecessary. At any rate, Coors involvement in interstate commerce totaled more than twenty million dollars per year in Texas alone.

The primary jurisdiction in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), was based on the broad geographical effect of a business practice which was enforced against a small intrastate operator.

> When, as in Lehrman's case, a broadly-utilized but facially benign business practice is applied in anticompetitive fashion against a single operator, it matters not that his own trade has only an insubstantial effect on interstate commerce. For the conduct of the defendant injects a broad, coercive threat into the otherwise benign practice and is therefore 'reasonably calculated to prejudice the public flow of interstate commerce.' *Id.* at 34.

. . . . . .

> [W]e consider [Gulf's] treatment of Lehrman and the harm to the nation's commerce that would be threatened by allowing Gulf's behavior to go uncorrected. The TCA network throughout the southwest (indeed, throughout the rest of the United States) constituted the applicable 'contract, combination, or conspiracy' of Gulf with its retailers and with its competitor Cape Oil Company . . . . Because of the broad scope of the TCA mechanism, however inherently compatible with competition, the treatment of Lehrman when he disobeyed Gulf's price 'suggestions' transformed a practice benign on its face into a coercive practice with untold geographical potential for deterring Gulf retailers from freely determining their own retail prices and for reassuring Cape Oil of Gulf's resolve to enforce Gulf's 'suggested' prices. *Id.* at 32.

The secondary basis of jurisdiction in *Lehrman* was the ancillary effect of Gulf's practices on Lehrman's sale of tires, batteries and accessories which moved in interstate commerce. The court considered the effect on these interstate commerce products to be appreciable only:

> because, while small relative to total Gulf TBA sales, the gross amount of such sales would be significant over the extended period of time Lehrman might have been able to continue in business. *Id.* at 35.

Gulf had completely driven Lehrman out of business, thus rendering insubstantial interstate commerce involvement cumulatively substantial. The Feminist Center, rather than being driven out of business like *Lehrman,* has grown and prospered.

An example of the sort of interstate commerce involvement which would support antitrust jurisdiction was given by this Court three years ago in *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738 (1976). The operator of a forty-nine bed hospital planned an expansion to one hundred forty beds. It charged defendants with concerted efforts to block the expansion. Defendants' motion to dismiss the complaint was granted and the dismissal affirmed by the Fourth Circuit.[4] This Court reversed the dismissal as premature. It noted that 80% of the $112,000.00 spent in plaintiff's purchase of supplies in 1972 came from out-of-state sellers. Revenues from foreign insurance companies would be curtailed. The management fee paid by plaintiff to its out-of-state parent corporation would be reduced. Most importantly, the multi-million

4. 511 F. 2d 678 (4th Cir. 1975).

dollar financing for expansion, a large portion of which would come from out-of-state institutions, would not take place. It is noteworthy that this Court did not consider treatment by plaintiff of patients from other states. This fact was alleged as jurisdictionally significant by the Feminist Center in this suit and found significant by the Fifth Circuit despite this court's contrary ruling in *United States v. Oregon State Medical Society,* 343 U.S. 326 (1952); and the Fifth Circuit's own contrary ruling in this term in *McLain v. Real Estate Board of New Orleans, Inc.,* 583 F .2d 1315 (5th Cir. 1978); *cert. granted,* 47 U.S.L.W. 3739 (May 15, 1979).

In an extensive review of Sherman Act cases, petitioners have been unable to find a single instance wherein such a meager and attenuated nexus with interstate commerce as is recited by the Fifth Circuit was sufficient to confer Sherman Act jurisdiction. Appropriately, many of the Circuit Courts have recently focused on the need to re-establish interstate commerce limits on antitrust jurisdiction.

> Our most serious concern in following the logic of [several recent cases] was the feeling that the effect is to read the interstate commerce clause out of the Sherman Act since it is virtually impossible to restrain commerce of any kind without in some way affecting the flow of out-of-state supplies. *Doctors, Inc. v.*

> *Blue Cross of Greater Philadelphia,* 490 F.2d 48, 53 (3rd Cir. 1973).

Similarly, in *Rasmussen v. American Dairy Ass'n.*, 472 F .2d 517 (9th Cir. 1972), the court opined:

> We recognize, however, that there must be some limit on the intrusiveness of Sherman Act regulation. Since every enterprise, however localized, inevitably has some effect, however remote, on the flow of commerce among the states, some "localness," "remoteness," or "de minimis" factor must intervene or federal regulation is boundless. *Id.* at 526.

Petitioners assert that the fully developed facts of this case afford an attractive opportunity to establish a "remoteness" or "de minimis" standard.

II. DID THE FIFTH CIRCUIT ERR IN RULING THAT *POTENTIAL* EFFECT ON THE INTERSTATE COMMERCE ELEMENTS OF RESPONDENT'S BUSINESS WAS SUFFICIENT TO CONFER ANTITRUST JURISDICTION THOUGH NO *ACTUAL* DETRIMENTAL EFFECT WAS DEMONSTRATED DURING A FULL EVIDENTIARY HEARING?

The Fifth Circuit enunciated a new and startlingly different test for Sherman Act jurisdiction in its decision below.

> Whether the conduct complained of falls within the scope of the Sherman Act's "jurisdiction" turns on whether it has or *could likely have* a substantial effect on interstate commerce. *Feminist Women's Health Center, Inc. v. Mohammad, M.D.*, 586 F.2d 530, 539 (5th Cir. 1978). [Emphasis added.]

Neither this Court nor the courts of appeals have ever grounded Sherman Act jurisdiction on the mere potential for substantial effect on interstate commerce. It should once again be noted that the court's determination of jurisdiction was far from summary. Substantial discovery had been completed. A full evidentiary hearing was conducted on this issue alone. The findings of fact recited in the Fifth Circuit's opinion resulted from that hearing. Respondent was given an unrestricted opportunity to demonstrate the *actual* effect of petitioners' alleged anti-competitive conduct on the interstate elements of its business. No detrimental effect was demonstrated. To the contrary, the court specifically found that "from the center's inception, the volume of patients and the gross income of the clinic steadily increased." *Id.* at 539.

This Court in *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186 (1974), deliberately emphasized the outer limits of jurisdiction under federal antitrust prohibitions as follows:

> The plaintiff must allege and prove that apparently local acts *in fact have* adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. *Id.* at 202. [Emphasis added.]

This Court's *Gulf Oil* standard had been developed in a line of cases beginning with the landmark decision in *Wickard v. Filburn,* 317 U.S. 111 (1942), and carried through the decision in *Mandeville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948).

> In *Wickard v. Filburn,* this Court noted that:
> Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it *exerts a substantial economic effect on interstate commerce* . . . . *Id.* at 89. [Emphasis added.]

In each of the cases cited there was activity which did impact on interstate commerce. In fact in each and every case where the Supreme Court has found that local activity would be subject to Sherman Act scrutiny, the decision has been based upon *actual* effect on interstate commerce. *See, United States v. Women's Sportswear Ass'n.,* 336 U.S. 460 (1949); *United States v. Employing Plasterers Ass'n.,* 347 U.S. 186 (1954); *Burke v. Ford,* 389 U.S. 320 (1967); *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975); *Hospital Building Co. v.*

Trustees of Rex Hospital, 425 U.S. 738 (1976). The mere potential for impact on interstate commerce has never been held by this court to support Sherman Act jurisdiction.

Three cases were cited by the Fifth Circuit to bolster its novel jurisdictional standard. Petitioners suggest that they do not provide the necessary support. In *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.,* 555 F.2d 426 (5th Cir. 1977), a golf equipment retailer sued Wilson Sporting Goods and the PGA for conspiracy to prevent him from selling "pro line" golf equipment. The subject of the alleged conspiracy was obviously a commodity moving in interstate commerce. No jurisdictional issue is even discussed in the case. Clearly, the alleged conduct had been going on for many years and no recourse to speculation was required.

Lehrman v. Gulf Oil Corp., supra, has already been discussed. The impact on commerce was obvious because the pricing scheme which Gulf Oil enforced against Lehrman was a nationwide arrangement. Further, Lehrman was driven completely out of business. Once again, there was no need to consider potential impact on interstate commerce.

The Fifth Circuit lastly cited *International Salt Co. v. United States,* 332 U.S. 392 (1947), for its departure from the existing jurisdictional standard. Once again, no jurisdictional issue was raised in the *International Salt* case. The suit was by the United States against the largest distributor of salt products in the country for tying its sales of salt and salt tablets to the use of two

machines on which it held patents. The machinery lease scheme was "in commerce" and thus no "effect on commerce" test ever had to be applied.

The establishment of a speculative standard for interstate commerce impact of a purely local activity has injected a new and troubling element of uncertainty in the application of the antitrust laws. Litigation in this arena is extraordinarily complex and expensive. The award of treble damages is punitive in nature. The long standing requirement for actual impact on interstate commerce should have been applied in this case.

III. DID THE FIFTH CIRCUIT ERR IN NOT EXTENDING *NOERR - PENNINGTON* PROTECTIONS TO PETITIONERS' INTRA-HOSPITAL COMMUNICATIONS AND TO PETITIONERS' COMMUNICATIONS WITH OTHER COMPONENTS OF FLORIDA'S STATUTORY MEDICAL SELF-REGULATION SCHEME?

Two landmark decisions of this Court are the foundation of the constitutional doctrine bearing their names. The Noerr-Pennington doctrine holds that antitrust liability cannot be based on group efforts to influence passage or enforcement of laws.

Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127 (1961), was the culmination of a struggle by the railroads to prevent Pennsylvania

longhaul truckers from cutting into their market. The railroad, through front organizations, conducted a publicity compaign against the trucking industry. Enough public sentiment was turned against the truckers for Pennsylvania's governor to veto a bill increasing trucking weight limitations.

The District Court[5] found that the campaign was fraudulent, malicious, and in violation of federal antitrust laws. The Third Circuit[6] affirmed. This Court reversed.

> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the Legislature or the Executive to take particular action with respect to a law that would produce a restraint or monopoly. *Id* at 136.
>
> . . . . . .
>
> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot be properly made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantge to their competitors.

5. 155 F. Supp. 768 (E.D. Penn. 1957).
6. 273 F.2d 218 (3rd Cir. 1959).

.....

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instance in which that right may be of the most importance to them. *Id.* at 139.

Four years later in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965), this Court held:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. *Id.* at 670.

In both cases, the defendants launched massive campaigns specifically to influence passage and enforcement of laws to the economic detriment of their competitors.

The constitutional basis of the doctrine was amplified and broadened in *California Motors Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972). One group of truckers attempted to prevent a competing group from obtaining access to their

common licensing and regulatory body. This Court noted:

> The same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to the Courts, the third branch of government. Certainly the right to petition extends to all departments of the government. The right of access to the Courts is indeed but one aspect of the right to petition.
>
> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. *Id.* at 510-11.

The Fifth Circuit in the present case recognized the application of the doctrine to the petitioners' communication to the Florida Board of Medical Examiners (B.O.M.E.)

> The (OB/GYN) Committee's letter of complaint to Dr. Palmer is a form of activity that is protected by the *Noerr-Pennington* doctrine absent proof of sham. The Board of Medical Examiners is a creature of state law. Section 458.1201 of the Florida Statutes authorizes the Board to discipline licensed physicians found guilty of any of the violations defined by chapter 458. The defendant doctors wrote Dr. Palmer requesting him to investigate possible violations of the medical practice act. *Feminist Women's Health Center* v. *Mohammad, M.D., supra,* at 542-43.

The Fifth Circuit limited the petitioners' first amendment protections to the B.O.M.E. communication. That limitation was erroneous on two grounds. First, it does not recognize the governmental/quasi-governmental integration of Florida's medical self-regulation scheme. Secondly, it does not recognize that public group communications do not spring full-grown from an organization's loins. The content of the communication must be formulated in intra-group discussions.

The Florida Medical Regulation Scheme

This Court has recognized the unique role of medical self-regulation in several recent cases, particularly in the area of protecting abortion patients. In *Roe v. Wade,* 410 U.S. 113 (1973), the Court noted:

> [I]f an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and *intra-professional,* are available. *Id.* at 166. [Emphasis added.]

Similarly, in *Doe v. Bolton,* 410 U.S. 179 (1973), it was said:

> If a physician is licensed by the state, he is recognized by the state as capable of exercising acceptable clinical judgement. If he fails in this, *professional censure* and deprivation of his license are available. *Id.* at 199. [Emphasis added.]

The Florida scheme of medical regulation is a blend of governmental and quasi-governmental components. The Fifth Circuit afforded Noerr-Pennington status to the governmental component. Contrary to the trial court, it denied that status to the quasi-governmental components.

Fla. Stat. ch 458, the Medical Practice Act, integrated traditional medical peer review groups into its agency scheme:

> to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified

> practice of medicine and from unprofessional conduct by persons licensed to practice medicine. Fla. Stat. ch. 458.001 (1975).

A governmental body, the Board of Medical Examiners, was created by Fla. Stat. ch. 458.01. The Board is composed of ten practicing physicians who serve without pay.[7] It is empowered to employ an executive director by section 458.04 (1).

Rather than assemble completely new institutions to serve the state police power on the local and regional level, the legislature effectively conscripted the traditionally existing medical societies and hospital staffs[8] into the regulation scheme. The Board of Medical Examiners was authorized to discipline a licensed doctor for:

> Being removed or suspended, or having disciplinary action taken, by his peers within any professional medical association, society . . . or similarly constituted professional body, whether or not such association, society, organization or body is local . . . , or by being disciplined by a licensed hospital or medical staff of said hospital . . . .

7. The doctors receive $10 per day on days they meet, and state per diem and mileage.

8. The discipline function of hospitals licensed in Florida is codified in Fla. Stat. ch. 395.065 (1975).

The draft of these component bodies into quasi-governmental service was enforced by the additional provision that:

> Any body taking action as set forth in this paragraph shall report such action to the Board [of Medical Examiners] within thirty days of its occurrence or be subject to a fine not exceeding $500. Fla. Stat. ch. 458.1201 (P).

This is the scheme of medical regulation duly enacted into Florida law. The police function is critically dependent upon attaching petitioning immunity not only to the B.O.M.E. but to each of the quasi-governmental components. Petitioners' communications to the Jacksonville Hospital staff chairman and to the local medical society are entitled to that protection.

The executive director of the Board of Medical Examiners described the scheme of regulation thusly:

> [C]ounty Medical Societies and organized medical groups are obligated to report any actions they take against physicians. And we do the same with them.
>
> If we don't do that, we would destroy a great deal of our effectiveness in properly conducting investigations and in disci-

plining, when necessary, our regulants.

The Formulation of Group Communication

Perhaps the most troubling aspect of Fifth Circuit's application of the Noerr-Pennington doctrine is its observation:

> Although the actions of such groups [medical staffs and societies] in reporting disciplinary findings and suspected violations to the B.O.M.E. may be petitioning activity within the meaning of the First Amendment, *communications within those groups are not. Feminist Women's Health Center, Inc. v. Mohammad, M.D., supra,* at 545. [Emphasis added.]

This is an extraordinary limitation on the First Amendment. Surely this Court intended Noerr-Pennington protections to cover activities leading up to and culminating in the actual petitioning process. It cannot be seriously contended that the railroad representatives in *Noerr* and the mine operators and union officials in *Pennington* did not jointly formulate their plans and strategy for influencing the Governor of Pennsylvania or the Secretary of Labor before placing their plans in motion.

So it was in the case at the bar. The doctors expressed their concerns and mutually decided upon their course of action. The Fifth Circuit's denial of Noerr-Pennington protections to pre-petitioning conduct amounts to an abolition of the doctrine. This is the same sort of formalistic approach to First Amendment protections the Fifth Circuit took in *Ayers v. Western Line Consolidated School Dist.*, 555 F.2d 1309 (5th Cir. 1977); *rev'd. sub nom., Givhan v. Western Line Consolidated School Dist.*, 99 S. Ct. 693 (1979). This decision should be reversed as well.

IV. DID THE FIFTH CIRCUIT ERR IN FINDING A TRIABLE ISSUE REGARDING THE APPLICATION OF THE SHAM EXCEPTION TO PETITIONERS' *NOERR-PENNINGTON* PROTECTED COMMUNICATIONS WITH THE FLORIDA BOARD OF MEDICAL EXAMINERS.

The Fifth Circuit affirmed the District Court's finding that the letter of the OB/GYN staff to the Board of Medical Examiners was protected by the Noerr-Pennington doctrine. It held, however, that a triable issue remained as to whether the letter was but a sham effort to influence government action. The Fifth Circuit ruled that the trial court erected a special burden of proof of sham conduct. In fact, the trial court merely followed the guidance of *Otter Tail Co. v. United States*, 410 U.S. 366 (1973); and *California Motor Transport v. Trucking Unlimited,* 404 U.S. 508 (1972).

In *Otter Tail*, the Court noted that antitrust liability could attach despite Noerr-Pennington protection where:

> The purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims. *Id* at 380.

Similarly, in *California Motor Transport*, the Court concluded the sham exception would apply where the evidence showed:

> A pattern of baseless, repetitive claims [which leads to the conclusion that] the administrative and judicial processes have been abused. *Id.* at 513.

Subsequent decisions hold that *absolute* immunity extends to efforts to inform officials or influence official action. *Franchise Realty Interstate Corp. v. San Fransisco Local Joint Ex. Bd. of Cullinary Workers*, 542 F.2d 1076 (9th Cir. 1976); *cert. denied*, 430 U.S. 940 (1977); *Metro-Cable Co. v. C.A.T.V. of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975).

The trial court did not impose a higher burden of proof on respondent. It merely required respondent to present evidence to oppose petitioners' ample proof that the letter sent to the Board of Medical Examiners was

an honest attempt to secure Board action. The letter expressed concern that violations of the Medical Practices Act may be occurring at respondent's clinic. It requested the Board to investigate the matter. The Board conducted its investigation and reported its results. Respondent was unable to present any evidence that the petitioners did not genuinely intend for the Florida Board of Medical Examiners to act upon their letter. That is why summary judgment was granted and the trial court's judgment should not have been disturbed.

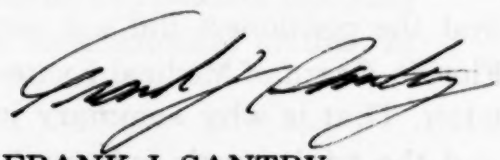
V. DID THE FIFTH CIRCUIT ERR IN REVERSING SUMMARY JUDGMENT FOR PETITIONERS ON THE CONSPIRACY TO MONOPOLIZE CLAIM?

The Fifth Circuit reversed summary judgment in petitioners' favor on the attempt to monopolize claim. The appeals court concluded there was a genuine issue on whether petitioners were close to possessing monopoly power. The record basis of this conclusion is not cited.

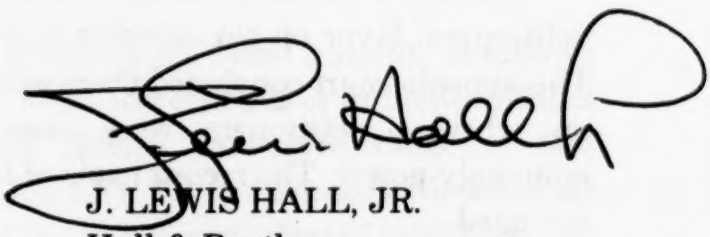
The undisputed facts are that prior to respondent's opening, out-patient abortions were not available in Tallahassee. During its first year of operation respondent did 62 abortions per month. The three petitioners who did abortions did a total of 14 per month. This cannot be the factual basis for finding a

"dangerous probability" of monopolistic success as defined by *Sulmerger v. Coca Cola Co.*, 515 F.2d 835 (5th Cir. 1975).

Respectfully submitted,



FRANK J. SANTRY
Keen, O'Kelley, Field &
Ellis, P.A.
Post Office Box 1879
Tallahassee, Florida 32302
Attorneys for Petitioners,
Mohammad, Curry, Crane and
Griner



J. LEWIS HALL, JR.
Hall & Booth
Post Office Drawer 804
Tallahassee, Florida 32302
Attorneys for Petitoner,
Messer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing petition for writ of certiorari were fowarded by first class mail or airmail pursuant to rule 33(1) and 33(3) (b) this 1st day of June, 1979, to:

Betty O. Stinson
517 East College Avenue
Tallahassee, Florida 32301

Kent Spriggs
324 West College Avenue
Tallahassee, Florida 32301

Ms. Nadine Taub
175 University Avenue
Newark, New Jersey

Joan Friedland
Women's Right Litigation Clinic
Rutgers Law School
172 University Avenue
Newark, New Jersey 07102

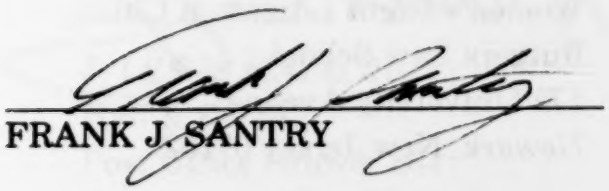
Pamela Horowitz & John Carroll
Southern Poverty Law Center
101 South Hull Street
Montgomery, Alabama 36101

Michael I. Schwartz
Suite 201, Ellis Building
1311 Executive Center Drive
Tallahassee, Florida 32301

Murray M. Wadsworth
Post Office Box 1876
Tallahassee, Florida 32302

John C. Cooper
Post Office Box 1674
Tallahassee, Florida 32302

B.J. Bradshaw
Fulbright & Jaworski
800 Bank of the Southwest Bldg.
Houston, Texas 77002



FRANK J. SANTRY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1924

D. C. Docket No. TCA 75-186

FEMINIST WOMEN'S HEALTH
CENTER, INC., ETC.,
Plaintiff-Appellant,
Cross-Appellee,

versus

MAHMOOD MOHAMMAD, M D. ET AL.,
Defendants-Appellees,
Cross-Appellants.

Appeals from the United States District Court for the Northern District of Florida

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

December 20, 1978

Thornberry, Circuit Judge, specially concurring.

Issued As Mandate:

FEMINIST WOMEN'S HEALTH CENTER, INC., a Florida non-profit Corporation,
Plaintiff-Appellant
Cross-Appellee,

versus

Mahmood MOHAMMAD, M. D. et al.,
Defendants-Appellees
Cross-Appellants.

No. 77-1924.

United States Court of Appeals,
Fifth Circuit.

Dec. 20, 1978.

Appeals from the United States District Court for the Northern District of Florida.

Before WISDOM, THORNBERRY and RUBIN, Circuit Judges.

WISDOM, Circuit Judge:

This appeal from an antitrust summary judgment raises questions concerning the jurisdictional reach of the Sherman Act, the scope of the *Noerr-Pennington* defense, the *Parker* doctrine of state action immunity, and the applicability of Florida's anticombination statute to the medical profession. The Feminist Women's Health Center, Inc. ("the Center"), brought this action for injunctive and monetary relief against Drs. Mohammad, Curry, Knight, Crane, Griner, Messer, and Palmer (individually and in his capacity as Executive Director of the Florida Board of Medical Examiners ("BOME")). The Center alleged that the doctors conspired to boycott the Center's Tallahassee abortion clinic, and to fix the prices for abortions in the

Tallahassee area in violation of federal and state antitrust laws. The Center further alleged that the doctors individually, and in combination, attempted to, and in fact did, monopolize the market for providing women's health and abortion services in the Tallahassee area. In addition, the Center complained that certain tactics used by the defendants amounted under Florida law to tortious interference with the Center's business relationships with its physicians. After extensive pretrial discovery, the trial court granted summary judgment in favor of all defendants on all counts, and the Center brought this appeal. The doctors cross-appeal the trial court's early ruling denying their motion for summary judgment for lack of subject matter jurisdiction. We affirm the trial court's jurisdictional ruling and its order with respect to the state law antitrust counts and reverse on all other points.

I

BACKGROUND

Because this appeal arises from a summary judgment, the statement of the background of the case is drawn from a record that reflects numerous disputed or potentially disputable issues of fact. Summary judgment having been entered against the plaintiff Center, the following discussion views disputed issues of fact in a manner favorable to the plaintiff.

The Feminist Women's Health Center, Inc., a Florida nonprofit corporation, operates the Women's Choice

Clinic, a women's health and first trimester elective abortions clinic in Tallahassee, Florida. The Center was incorporated in 1974 and opened its office in Tallahassee on June 29, 1974. The Center employs ten to fourteen lay "health workers" and occasionally a laboratory technologist, a registered nurse, and a nurse-practitioner. The Center does not keep full time physicians on its staff, but rather uses physicians on a part-time basis to perform abortions, and, when possible, to provide "back-up" emergency services when patients develop post-operative complications. The Center charges about $150 for an abortion, $25 to $35 of which is paid by the Center to the operating physician.

Defendants Mohammad, Curry, Crane, Knight, Griner, and Messer are Tallahassee physicians specializing in obstetrics and gynecology. All are members of the gynecology and obstetrics staff ("OB-GYN Staff") of Tallahassee Memorial Hospital, the only hospital in Leon County, Florida, that has complete facilities for treating patients with obstetrical and gynecological problems. Defendant Palmer is a physician who practices in Tallahassee, and is Executive Director of the Florida Board of Medical Examiners, the body that licenses physicians and regulates the practice of medicine in the State of Florida.

Even before it opened its doors, the clinic was a matter of concern to the obstetrics and gynecological staff of Tallahassee Memorial. At its regular monthly

staff meeting in May, 1974 the OB-GYN Staff adopted a resolution that it would not "approve" the Center if no member of the hospital staff were associated with the Center. The resolution, according to Dr. Brickler, the member of the OB-GYN Staff who first brought the Center to the staff's attention, was intended to express the staff's concern that the clinic have an "acceptable" local physician who would be available to take care of post-operative emergencies.

Despite some initial difficulties in recruiting physicians, the clinic operated without substantial controversy its first year. In the spring of 1974, Lynn Heidelberg and Linda Curtis, two of the Center's directors, approached Drs. Brickler and Mohammad about working at the clinic. According to Ms. Curtis, Dr. Mohammad initially expressed interest in doing so, but at a second meeting changed his mind, citing pressure from his colleagues as well as the May resolution of the OB-GYN Staff. Dr. Mohammad indicated that he might consider working at the clinic, but only at a fee of $100 per procedure, a figure that is approximately triple the fee customarily received by operating physicians at the clinic. Dr. Brickler, on the other hand, decided to work at the clinic after having initially expressed fears that the OB-GYN Staff would disapprove of his doing so. Dr. Brickler informed the Center, however, that he would associate with the clinic on the condition that the clinic not advertise its services. The Center agreed and Dr. Brickler began his work for the clinic. In April 1975 Dr. McWilliams, another member

of the Tallahassee Memorial OB-GYN Staff, began performing abortions at the clinic and handling post-operative aftercare. Drs. Brickler and McWilliams performed 816 abortions at the clinic that first year.

The clinic's difficulties began in June of 1975 when Linda Curtis gave an interview to the *Tallahassee Democrat*, the city's daily newspaper. The interview resulted in the publication in the June 20 edition of the *Democrat* of an article in which Ms. Curtis described the clinic and favorably compared its services with hospital abortion procedures. In particular, the interview emphasized the relative inexpensiveness of first trimester elective abortions at the clinic, and the advantages to women of choosing a place where "women set the pace for what goes on". The next day, Dr. Brickler terminated his relationship with the clinic, apparently because of the article.

The newspaper article succeeded in making the clinic, once again, a subject of great interest to the OB-GYN Staff at Tallahassee Memorial. At the July 1, 1975 meeting of the OB-GYN Staff, at which Drs. Messer, Griner, Crane, and Mohammad were present, Dr. Messer noted that Dr. Brickler was no longer working at the clinic and that an out-of-town physician was working there. The staff discussed the question of the ethics of the clinic's advertising, and concluded that physicians should not associate with organizations that advertise their medical services. The staff decided to bring the matter of the clinic's advertising to the atten-

tion of the State Board of Medical Examiners. The minutes of that meeting record that "Dr. Brickler commented he feels the local situation will collapse if it does not get support from the Obstetricians". A day or so after that meeting, Dr. McWilliams, who had attended the meeting, called the Center to inform it that he could not continue working at the clinic unless the controversy concerning the clinic's advertising was straightened out. He informed the clinic that Dr. Mohammad was upset about the newspaper article. In the days following the July 1 meeting Ms. Curtis met with Dr. Mohammad, who said that the Center should stop all advertising and that those associated with it should not make speeches about the Center. At that time Dr. Mohammad agreed to arrange an emergency meeting of the OB-GYN Department so that representatives of the Center could meet the other members of the staff. When Ms. Curtis and another director of the Center arrived for the emergency meeting on July 8 or 9 only Dr. Mohammad was present. Dr. McWilliams stated in his deposition that he was notified of a meeting earlier that day, but was not informed about the purpose of the meeting and therefore failed to attend. No further meeting was scheduled. Dr. McWilliams testified that he again raised the question of such a meeting with Dr. Mohammad, but Dr. Mohammad informed him that he had polled the other members of the staff and that no one wished to meet with representatives of the Center.

At the next monthly meeting of the OB-GYN Service on August 5, 1975, the staff passed a motion that

the Service write a letter to the Capital Medical Society ("CMS"), a private organization of Tallahassee area physicians, expressing the doctors' view that physicians in the CMS should not associate with organizations that advertise their medical services. Dr. McWilliams spoke up to explain that he was unaware when he began working for the Center that the clinic was controversial because of its advertising and its nonprofit status. He revealed to the staff that he had told the clinic of his plans to leave if the controversy was not settled. Four days later, he told the Center that he would have to leave, citing the controversy and his desire not to fall into disfavor with his colleagues. As Dr. McWilliams explained in his deposition, he chose to leave "because of something that I was doing that they [the Tallahassee OB-GYNs] considered unethical". Shortly thereafter, Dr. McWilliams left the clinic.

About the time that Dr. McWilliams left the clinic, the Center called upon Dr. Brickler, who had severed his relations with the clinic some months earlier, in an effort to recruit him to handle back-up or post-operative emergencies, either on a formal or an informal basis. Dr. Brickler, according to his deposition, told the Center that if it referred a patient to his office for post-operative care he would see the patient, just as he would see any other patient. He declined, however, to enter any formal arrangement with the Center. Brickler indicated that to do so would involve him in controversy with his fellow obstetricians. The OB-GYNs, according to Brickler's deposition, "almost

literally sleep together", and his colleagues could make things very unpleasant for him; they could, for example, refuse to take his patients were he to leave town.

Beginning in July or August 1975, the clinic began to rely heavily on the services of residents-in-training at the University Hospital in Jacksonville. The Center had arrangements with the Jacksonville residents that they would come to Tallahassee one day a week to perform abortions at the clinic. On August 29 the OB-GYN Staff sent a letter to defendant Palmer, Executive Director of the BOME, stating that out-of-town doctors were performing surgery at the clinic without adequate provision for continuous aftercare, in possible violation of the Florida Medical Practice Act. The letter requested Dr. Palmer to take "appropriate corrective measures". Acting on the staff's complaint, as he was required to do by law, Dr. Palmer visited the clinic, accompanied by Ed McCollum, the Chief Investigator of the BOME, to view its operations and to determine what doctors were practicing there. He found that Dr. Walker Whaley, a resident physician from University Hospital in Jacksonville, was performing abortions at the clinic. Dr. Palmer inquired about aftercare coverage of the clinic's abortion patients, and was told by Ms. Curtis that the clinic had arrangements with Tallahassee Memorial to take care of post-operative complications. Later that day, Dr. Palmer called the hospital concerning the clinic's backup coverage. The hospital administrator informed Palmer that the backup arrangements were not formal, but that he had told Ms. Curtis that any clinic patient could come to the

hospital's emergency room for attention, as in the case of any person in need of immediate medical care.

Dr. Palmer then called Dr. Whaley on the telephone. After first identifying himself as the Executive Director of the BOME, and telling Dr. Whaley that the telephone call was personal in nature, Palmer told Whaley that his, Dr. Whaley's, activities were not in his opinion illegal, but that his personal advice was that it might be in Whaley's best interests to leave the clinic. Dr. Palmer thought that it was unwise for the young physician to get involved in something as controversial as the clinic. He pointed out that the aftercare arrangements were in his opinion "questionable", and that Dr. Whaley was running a risk of malpractice liability because he could not follow up on his patients at Tallahassee Memorial Hospital inasmuch as Whaley did not have staff privileges at Tallahassee Memorial, nor a Tallahassee or Leon County occupational license. Following his conversation with Dr. Whaley, Palmer called Dr. Mohammad to report his findings. On September 30, Dr. Palmer sent another investigator to the clinic to determine if the clinic, at that time, had a licensed physician performing abortions.

At the September 2, 1975 meeting of the OB-GYN Staff of Tallahassee Memorial, at which Drs. Crane, Curry, Griner, Messer, and Mohammad were present, the staff voted to send a letter to the residents at University Hospital in Jacksonville who were performing abortions at the clinic. The purpose of the communication was to inquire of the doctors whether proper

aftercare was being provided for the patients on whom the doctors were performing abortions at the Tallahassee clinic. On September 10, a letter, signed by all the defendants with the exception of Dr. Palmer, was sent not to the residents but to Dr. Robert Thompson, the head of the residency program at University Hospital. The letter stated:

> In the last monthly meeting of the OB-GYN Staff at Tallahassee Memorial Hospital, the subject of the Feminist Womens' Health Clinic was brought up, and the fact that one or two of the residents from your program performed abortions without provision for possible complications and leave patients without provision for 24-hour coverage was discussed.
>
> For your information, the Feminist Womens' Health Center has no backup for abortions performed and there is no physician in town covering aftercare complications of procedures done.

Dr. Whaley returned to the clinic after Dr. Palmer's call, but he told the Center that he could not work for them until the controversy was resolved. Dr. Whaley testified in his deposition that the aftercare problem was not the main reason that he left the clinic. His primary concern, he said, was the controversy between the clinic and the Tallahassee medical community. He ultimately left the clinic, he testified, because of the advice given him by several people.

Another of the residents at University Hospital in Jacksonville, Dr. Rhett, left the clinic in mid-September of 1975, following the staff's communication to Dr. Thompson. According to Dr. Rhett's deposition, he left the clinic because he could not get a straight answer from the clinic concerning its aftercare arrangements. He also testified that he felt threatened professionally by the controversy surrounding the Center.

The Center brought suit charging that the doctors had conspired to monopolize and restrain trade in the provision of abortions and related services, in violation of §§1 and 2 of the Sherman Act and §542.05 of the Florida statutes. The Center also charged that the doctors had unlawfully interfered with the Center's contractual relations with its physicians. Following the Center's filing of the complaint, the Capital Medical Society passed a resolution, coauthored by Dr. Palmer, to support the defendants in the prosecution in this litigation. The Center, throughout this litigation, has cited the Capital Medical Society's resolution as the "consummation" of the alleged conspiracy. On June 9, 1976 the trial court denied the Center's motion for a preliminary injunction. The court found that the plaintiff had demonstrated a substantial likelihood of prevailing on the merits of its claims against all defendants except Dr. Palmer, but that there was no likelihood that the Center would suffer irreparable harm pending adjudication of the cause. *Feminist Womens' Health Center v. Mohammad*, 1976, N.D.Fla., 415 F.Supp. 1258. The court intimated, in that order, that

the "state action" defense of *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, might be applicable to Dr. Palmer. In a pretrial order of September 3 the court granted Dr. Palmer's motion for summary judgment. On December 3, the court rendered summary judgment in favor of the remaining defendants.

II

THE REACH OF THE SHERMAN ACT

At the outset we face the question whether the district court had subject matter jurisdiction of this action. Jurisdiction is predicated upon §§4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26, which grant the federal district courts jurisdiction of private actions for treble damages and injunctive relief, respectively, to redress injuries resulting from violations of the federal antitrust laws. The appellees argue that subject matter jurisdiction is lacking because the action complained of does not have the effect on interstate commerce requisite to liability under the Sherman Act. If the Center has not stated a claim under the Sherman Act, then the federal court, of course, lacks jurisdiction of the pendent state law claims.

Section 1 of the Sherman Act outlaws every combination or conspiracy "in restraint of trade or commerce among the several States". Section 2 of the Act prohibits monopolization of, and attempts and conspiracies to monopolize "any part of the trade or commerce among the several States." It has been said that

"this language defines both the prohibited conduct and the jurisdictional range of the statute." Comment, 21 Vill.L.Rev. 721, 725 (1976); *see also Rasmussen v. American Dairy Ass'n*, 9 Cir. 1972, 472 F.2d 517, 521. The Supreme Court has construed the Sherman Act as reaching the full extent of the Congress's power under the commerce clause. Whether the conduct complained of falls within the scope of the Sherman Act's "jurisdiction" turns on whether it has or could likely[1] have a substantial effect on interstate commerce. *E.G., International Salt Co. v. United States*, 1947, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20; *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665.

The district court determined, after a full evidentiary hearing on the matter, that it had jurisdiction of the Center's claims. The court made the following findings. (1) Tallahassee, Florida, where the clinic is located, is within 30-35 miles of the Georgia state line. (2) Tallahassee is a center for health care in the northern Florida-southwestern Georgia area. (3) From June 1974 to September 1976, 2,177 abortions were performed at the plaintiff's clinic, 176 (or 8%) of which were performed on persons who came from outside the state of Florida. Abortions for out-of-state patients brought the plaintiff roughly $26,400 in gross receipts. (4) From June 1974 through April 1976 the Center

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1 Antitrust plaintiffs need not await complete ruin before asserting their rights. *See Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 5 Cir. 1977, 555 F.2d 426.

received $562.00 in payments from out-of-state insurance companies for abortions performed at the clinic. (5) From June 1974 through September 1976 the Center made out-of-state purchases of $10,017.34 of supplies and equipment to be used in connection with the provision of abortion services. At least $9,845.34 of these supplies were purchased in the period of June 1974 to April 1976. (6) In that same period the Center purchased $15,493.79 of supplies from within the state of Florida. (7) From June 1974 through July 1976 the Center spent $4,340.65 on interstate travel by its officers and employees. (8) From the Center's inception, the volume of patients and the gross income of the clinic steadily increased. The district court found that the clinic had developed significant contacts with interstate activity, and that its interstate connections are likely to grow as the business grows. Taking the allegations of the complaint as true, the court concluded, the clinic and its interstate business was seriously threatened by the defendants' actions.[2]

The defendants do not quarrel with the district court's findings of fact, but do contest its conclusion that the facts show a quantum of interstate involvement sufficient to sustain Sherman Act jurisdiction.

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2 In determining the jurisdictional issue the district court refused to consider the interstate flow of Medicaid payments received by the Center. On appeal, the Center (the cross-appellee on this issue) has urged that the trial court should have taken those payments into account, citing *Alabama Optometric Ass'n v. Alabama State Board of Health*, 1972, M.D. Ala., 379 F.Supp. 1332. Since we affirm the trial court's jurisdictional ruling in favor of the Center, we need not address that issue.

They argue that the Center's business is not converted into an interstate business by virtue of the clinic's treatment of patients who travel from other states to use its services. Indeed, they seem to maintain that the flow of out-of-state patients must be ignored altogether. Once the interstate flow of patients is discounted, the physicians contend, the interstate connection is de minimis and certainly far more tenuous than any that has been held sufficient for Sherman Act purposes in any reported case. We disagree with both contentions; we hold that the district court did not err.

Although the mere fact of dealings with out-of-state customers, whether or not those customers cross state lines for the purpose of buying a firm's goods or services, might not of itself establish a sufficient interstate nexus, it does not follow that those dealings are of no pertinence whatsoever. The Sherman Act reaches conduct that is likely to have a substantial adverse effect on interstate commerce, a question, as we have emphasized in prior decisions, that is to be determined from the aggregate of factors. *St. Bernard General Hospital, Inc. v. Hospital Service Ass'n*, 5 Cir. 1975, 510 F.2d 1121, 1125; *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, 48, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665. The plaintiff's business with out-of-state patients is one of the factors to be considered. Were the Center forced to close the Tallahassee clinic, the flow of persons crossing state lines to avail themselves of the clinic's services would cease. That the patients come to the plaintiff, and not the plaintiff to the patients, does

not alter the interstate character of those transactions.[3]

Looking to the aggregate of factors, including the clinic's volume of out-of-state patients, we cannot say that the Center has failed to demonstrate a likelihood of substantial impact on interstate commerce. There is, of course, no ready and easy test for determining whether particular restraints have, or will likely have, the requisite effect in interstate commerce. As the Third Circuit Court of Appeals has observed, "the precedent in this area is unlikely to dictate the outcome in any given case. Instead, it is more likely to communicate a general sense as to how much of an impact

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3 This Court's recent decision in *McLain v. Real Estate Board of New Orleans, Inc.*, 5 Cir., 583 F.2d 1315, 1978, is not to the contrary. That case involved a civil action alleging that real estate brokers fixed prices in connection with the sale of real estate in the New Orleans area. The court applied the substantial effects test and held that Sherman Act jurisdiction is not conferred by the allegation "that many of the defendants' customers are 'persons moving into and out of the Greater New Orleans area.' " 583 F.2d at 1320. We do not read the *McLain* opinion to say that the flow of out-of-state customers is not a factor to be considered in determining jurisdiction, nor even that jurisdiction can never attach on the sole basis of transactions with out-of-state customers. The court held that residential real estate brokerage activities do not substantially affect interstate commerce because the interstate consequences are remote or incidental. 583 F.2d at 1320 & n. 4. That conclusion is unassailable, because few people cross state lines *for the purpose* of purchasing residential real estate. The effects of the conduct alleged in this case, accepting the allegations of the complaint as true, cannot be characterized as "remote" or "incidental", however, for the district court found that Tallahassee is a regional, interstate center for the provision of medical services. A fair implication from this finding is that persons cross the Florida-Georgia state line for the purpose of coming to the Center's Tallahassee clinic.

local activities must have upon interstate commerce before they confer jurisdiction." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 3 Cir. 1973, 490 F.2d 48, 51. The interstate effects alleged here are well within the boundaries suggested by the "general sense" or our decisions on Sherman Act jurisdiction.

In *Lehrman v. Gulf Oil Corp.*, 5 Cir. 1972, 464 F.2d 26, *cert. denied*, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665, this Court upheld jurisdiction in a case analogous to this one in its jurisdictional aspects. *Lehrman* was a private antitrust suit by a Gulf service station operator. Lehrman sought to recover damages that resulted from the effect on his business of Gulf's wholesale pricing practices. He urged that Gulf's pricing policies, by preventing him from engaging in price competition with nearby competitors, forced him out of business. Although we assumed, for purposes of the appeal, that the gasoline sold by the plaintiff never moved in interstate commerce, we nevertheless held that Gulf's conduct substantially affected interstate commerce. Two distinct and sufficient grounds for jurisdiction were set forth. First, we noted that Gulf's pricing system affected dealers throughout the southwestern United States, many of whom, the evidence tended to show, did distribute gasoline that moved in interstate commerce. Thus the pricing system as a whole constituted a combination that substantially restrained interstate commerce. The alternative ground is of importance to this appeal. We pointed out that Lehrman sold not only gasoline, but also tires, batteries, and accessories, the largest part of which, unlike his gas-

oline, originated from outside the state of Texas. The termination of Lehrman's business, we held, had an appreciable effect on the flow of tires, batteries, and accessories from outside Texas. We stated: "The effect was appreciable because, while small relative to total Gulf TBA sales, the gross amount of such sales would be significant over the extended period of time Lehrman might have been able to continue in business." *Id.* at 35.

The case of *Copper Liquor, Inc. v. Adolph Coors Co.*, 5 Cir. 1975, 506 F.2d 934 presented a similar situation. In *Copper Liquor* an owner of a retail liquor store sued the defendant brewing company complaining that the refusal of Coors's local distributor to sell him Coors beer was part of a conspiracy to fix retail prices, and that his inability to secure the beer from other distributors was the consequence of an unlawful scheme of territorial market division. We upheld Sherman Act jurisdiction, pointing to evidence showing that the unavailability of Coors beer at the plaintiff's retail store diminished customer demand for the plaintiff's other products that did move in interstate commerce. Citing *Lehrman* we observed: "This impact on other products has been held to have a sufficient effect on interstate commerce to bring the case within the federal antitrust laws." *Id.* at 949.

The activities affected by the restraints alleged in this case have an interstate nexus at least as substantial as those involved in *Lehrman* and *Copper Liquor*, and those

authorities therefore counsel affirmance of the district court's ruling on jurisdiction. In *Lehrman*, jurisdiction was founded on the impact of Gulf's activities upon the TBA items purchased and sold by a service station operator. That effect could hardly be more substantial than the cessation of the Center's purchases of $4,000 or $5,000 worth of out-of-state supplies a year and of the clinic's $12,000 worth of yearly business with out-of-state patients. The interstate nexus in *Copper Liquor* was even less substantial, for the plaintiff in that case did not contend, as the Center does here, that the challenged practices threatened to shut down his business, and with it his purchases of products in interstate commerce.

We conclude, from all the evidence adduced at the jurisdictional hearing before the district court, that the court ruled correctly. We recognize that there must be a limit on the reach of Sherman Act jurisdiction. This case, however, is within that limit.

III

THE MEMBERS OF THE OB-GYN STAFF

The district court granted summary judgment in favor of Drs. Mohammad, Curry, Crane, Knight, Griner, and Messer largely on the strength of the *Noerr-Pennington* doctrine. According to that doctrine, articulated in a line of Supreme Court decisions that began with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. 127, 81 S.Ct. 523, 5

L.Ed.2d 464, efforts to influence the government to take anticompetitive action cannot be made the basis of antitrust liability. *Noerr* itself concerned efforts to achieve anticompetitive ends by securing legislative action. Succeeding court decisions established that antitrust immunity extends to attempts to influence executive[4] and adjudicative[5] governmental bodies as well. The Court has held that petitioning activity is protected "regardless of intent or purpose." *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, 670, 85 S.Ct. 1585, 14 L.Ed.2d 626. The petitioning activity, however, must be genuine. Protection does not extend to purported petitioning that is in fact "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. at 144, 81 S.Ct. 523, 533. Although the Court's *Noerr* opinion suggested that petitioning activity is exempt because the Sherman Act was simply not designed to reach such conduct, it is now clear that the doctrine is rooted in the first amendment's guarantee of the right to petition. *See California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642; *see generally* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U.Chi.L.Rev. 80 (1977).

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4 *United Mine Workers v. Pennington*, 1965, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626.

5 *California Motor Transport v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642.

The trial court held the following conduct to be of the type protected by the *Noerr-Pennington* defense: (1) The OB-GYN Committee's letter to Dr. Palmer and the BOME; (2) the Committee's letter to Dr. Thompson, the head of the residency program at the Jacksonville hospital; (3) the Committee's communications to the Capitol Medical Society regarding the Center's abortion clinic; and (4) the discussions among the members of the OB-GYN staffs of Tallahassee Memorial and the Jacksonville hospital regarding their members' medical practice. Since these communications, in the district judge's opinion, make up the core of the Center's case against the physicians, he ruled that the fate of the action turned on whether the Center could bring it within the "sham" exception adumbrated in the Supreme Court's *Noerr* opinion. Finding that the plaintiff had insufficient evidence that the defendants' petitioning activities were sham, the court granted the defendants' motions for summary judgment.

The foundation of the trial court's ruling was its determination that the defendants' communications were protected petitioning activity. We hold, however, that the communications, with the exceptions of the physicians' letter of complaint to the BOME and their post-complaint activities in support of their position in this lawsuit, are as a matter of law unprotected by the *Noerr-Pennington* doctrine. In addition, a triable issue of fact remains as to whether the OB-GYN's letter of complaint to Dr. Palmer was but a sham effort to influence government action. The district court's mis-

application of the *Noerr* doctrine necessitates reversal of the judgment.

The Committee's letter of complaint to Dr. Palmer is a form of activity that is protected by the *Noerr-Pennington* doctrine absent proof of sham. The Board of Medical Examiners is a creature of state law. Section 458.1201 of the Florida Statutes authorizes the Board to discipline licensed physicians found guilty of any of the violations defined by chapter 458. The defendant doctors wrote Dr. Palmer requesting him to investigate possible violations of the Medical Practice Act. Whether the doctors' petition is immune from antitrust attack turns on the factual determination whether it was genuinely intended to influence Dr. Palmer to take official action in his capacity as Executive Director of the BOME.[6] It is the jury's task to resolve this issue.

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6 The court required the plaintiff to meet the high burden of proof of sham conduct suggested by the Supreme Court's opinion in *Otter Tail Co. v. United States*, 1973, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359. In *Otter Tail* the Court stated that antitrust liability may attach "where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims". 410 U.S. at 380, 93 S.Ct. at 1031. *See also California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 513, 92 S.Ct. 609, 30 L.Ed.2d 642. *Otter Tail* and *California Motor Transport* acknowledge that a showing of a pattern of repetitive, baseless claims is strong evidence of sham petitioning, but they do not hold that such evidence is *essential* to proof of sham. The *Noerr* doctrine presents no bar if the plaintiff proves that the petitioning was not a genuine effort to influence public officials to take governmental action. *See California Motor Transport*, 404 U.S. at 511-512, 92 S.Ct. 609; *see generally* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U.Chi.L.Rev. 80, 106-110 (1977). Absent clear direction from the Supreme Court, we see no reason for erecting a special, high burden of proof on this issue.

We agree with the district court, however, that the Center cannot base a right to recovery on the actions of Dr. Palmer and the other members of the Capitol Medical Society in adopting a resolution to provide moral and financial support to the doctors' defense of this lawsuit. The plaintiff Center characterizes the medical society's resolution of support as the "consummation" of the alleged conspiracy. In *California Motor Transport Co. v. Trucking Unlimited*, 1972, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642, the Supreme Court held that joint efforts of competitors to seek adjudicative action are protected. The first amendment right of competitors to join in petitioning courts and administrative bodies entails the right to band together for purposes of supporting litigation, as the physicians in the Capitol Medical Society have done here. Whether the action of the medical society can be linked to the alleged conspiracy that spawned the Center's original complaint is irrelevant, for petitioning activity according to *Pennington* "is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593. The district court did not err in granting summary judgment in favor of the defendants on this issue. There is no genuine issue as to the physicians' intent in adopting the resolution. It cannot be seriously urged that either the physicians' defense of this lawsuit or the medical society's resolution of support is a sham.[7]

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7 Moreover, it would be improper to admit evidence on the medical society's meeting and resolution. Evidence of activity that is protected by the *Noerr* doctrine may be admitted to show the purpose and character of other activity if doing so is not overly

The district court's determination that the other communications are protected rests on three statutes that, in its view, make the OB-GYN staffs and the Capitol Medical Society integral parts of the state's apparatus for regulating the practice of medicine. Section 768.40 of the Florida Statutes immunizes "medical review committees", such as local societies of health care providers and the medical staffs of licensed hospitals, from liability arising out of their actions taken in the course of evaluating the performance of health care providers. The statutes contemplate committees that concern themselves with the quality and cost of medical services rendered by providers. Section 395.065 authorizes the medical staff of licensed hospitals "to suspend, deny, revoke, or curtail the staff privileges of any staff member for good cause". The statute enumerates a few nonexclusive grounds constituting "good cause" and immunizes the hospital, staff, and staff members from liability arising out of actions taken in good faith in carrying out the staff's disciplinary function. Section 458.1201, the statute set-

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prejudicial to the defendants. *United Mine Workers v. Pennington*, 381 U.S. at 670-71 n. 3, 85 S.Ct. 1585; *Household Goods Carriers' Bureau v. Terrell*, 5 Cir. 1971, 452 F.2d 152, 158 n. 18. Admissibility, we think, should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights. The medical society's meeting and resolution have some evidentiary bearing on the character of the doctors' other actions and may aid in demonstrating Palmer's sympathies, but the probative value of this evidence is low. As evidence of the alleged conspiracy it is cumulative. As evidence of Dr. Palmer's state of mind it is exceedingly weak, for at the time the resolution was co-authored by Palmer he was already a party defendant to this suit. Its evidentiary value to the plaintiff is far outweighed by the defendants' first amendment interests.

ting forth the disciplinary powers of the BOME, authorizes the Board to impose penalties on licensed physicians who have been disciplined by a peer review association or a hospital medical staff, and requires such organizations to report all disciplinary actions to the BOME.[8] §458.1201(1)(p). The court felt that these

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8 The relevant portions of §458.1201 provide as follows:

(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any antecedent law who, after hearing, has been adjudged unqualified or guilty of any of the following:

* * *

(p) Being removed or suspended, or having disciplinary action taken by his peers within any professional medical association, society, professional standards review organization established pursuant to section 249F of Public Law 92-603, or similarly constituted professional body, whether or not such association, society, organization, or body is local, regional, state, national, or international in scope, or by being disciplined by a licensed hospital or medical staff of said hospital for immoral or unprofessional conduct or willful misconduct or negligence by the person in his capacity as a physician licensed pursuant to this chapter. Anybody taking action as set forth in this paragraph shall report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500.

* * *

(3)(a) When the board finds any person unqualified or guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following:

1. Deny his application for a license;
2. Permanently withhold issuance of a license;
3. Administer a public or private reprimand;
4. Suspend or limit or restrict his license to practice medicine for a period of up to five years;
5. Revoke indefinitely his license to practice medicine;

statutes, in effect, make the OB-GYN staffs and the Capitol Medical Society public regulatory bodies, and that the discussions at the OB-GYN Committee meetings and the Committee's letters to the Jacksonville OB-GYN's and the medical society were therefore protected solicitation of government action.

The defendants' claim of *Noerr* protection, in our view, rests ultimately on §458.1201. Section 768.40 does not recruit medical review committees into government service. The sole purpose of that provision is to confer limited immunity upon the actions of review commitees within the scope of their functions, as defined by subsection (1) of §768.40, and to bar the use of committee records and proceedings as evidence in civil actions.[9] Section 395.065 recognizes the existence of hospital staff self-regulation, imposes a "good cause" limitation on disposition of staff privileges, and insulates good faith disciplinary action from civil liability. This falls short of conferring governmental status upon hospital medical staffs.[10]

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6. Require him to submit to the care, counseling, or treatment of physicians designated by the board;

7. Require him to participate in a program of continuing education prescribed by the board;

8. Require him to practice under the direction of a physician in a public institution, a public or private health care program, or private practice for a period of time specified by the board.

9 Florida's Medical Practice Act cannot, of course, operate to bar the use of such evidence in the trial of a federal cause of action.

10 Moreover, the defendants do not argue that the communications in issue had anything to do with possible action regarding any physician's staff privileges.

Section 458.1201, however, affords a colorable basis for the defendants' claim. The statute, by enabling the BOME to take disciplinary action against physicians who have been disciplined by medical review organizations, vests those organizations with a kind of quasi-legislative authority. The appellees' strongest argument for *Noerr* protection is that communications between a review organization and its members looking towards possible disciplinary action constitutes the solicitation of action that, in the event it became the basis of BOME disciplinary action, would be legislative in character.

We are not persuaded, however, that §458.1201 makes medical review organizations public regulatory bodies. The contention that §458.1201 incorporates the disciplinary actions of such organization into regulatory law is weakened by the statute's permissive language. Subsection (1) does not *require* the BOME to take action against physicians disciplined by private professional groups; it merely authorizes the Board to do so. Subsection (3)(a) of the statute simply provides that the Board "may enter an order" penalizing physicians who are found to have violated the statute. Thus the Board is given broad discretion to decline to take action against physicians. Where the legislature, in §458.1201, intended to command a certain course of action, it made its intentions quite clear by using the word

"shall".[11] As we read the statute, disciplinary action by a medical peer group affords grounds for Board action but in no way binds the Board to act. Thus, ultimate authority to enact and enforce professional standards and to adjudicate violations of law rests with the Board. Hospital medical staffs and medical societies play an important role in Florida's regulatory scheme,[12] but that

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11 Section 458.1201(5), for example, provides: "The board *shall* report to the President of the Senate and the Speaker of the House of Representatives on February 1 of each year . . . the status of the actions taken by the board in carrying out the responsibilities assigned to it under this section." (Emphasis added.) Subsection (1)(p) states: "Anybody taking action as set forth in this paragraph *shall* report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500." (Emphasis added.)

12 Throughout the appellees' briefs runs the argument that free discussion will be chilled, and Florida's system of self-regulation severely hampered, if this Court does not rule that the conduct of the OB-GYNs is *Noerr*-protected. This is not, properly speaking, an argument from the first amendment's guarantee of the right to petition, but one from the amendment's guarantee of freedom of speech. If the facts, as fully developed, show that the OB-GYNs discussed the clinic and adopted certain resolutions concerning the clinic, a free speech question would be presented. If the facts suggested simply that certain physicians were persuaded by their colleagues that the clinic's mode of operations was detrimental to the public welfare, or that those physicians avoided the clinic simply out of the desire not to be poorly thought of by their colleagues, then the imposition of antitrust liability might implicate first amendment values. At this point in the litigation, however, the facts are insufficiently developed to speculate about the merits of a possible free speech defense. We do note, however, that in cases involving antitrust challenges to professional rules and canons enacted ostensibly in the public interest, the Supreme Court has not suggested that the first amendment bars relief. *See National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Goldfarb v. Virginia State Bar*, 1975, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572. It would seem anomalous to hold that the imposition of standards is not protected activity, but that the proposal and advocacy of standards in a manner bordering on imposition of standards is protected.

role is not a governmental one.[13] Although the actions of such groups in reporting disciplinary findings and suspected violations to the BOME may be petitioning activity within the meaning of the first amendment, communications within those groups are not.[14]

Evaluating the evidentiary materials on file in light of our ruling on the availability of the *Noerr-Pennington* defense, we conclude that there are triable issues of fact.[15] The district court itself in granting summary

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13 We do not imply that the disciplinary actions of the medical review groups would be governmental in character if the statute directed the BOME to take action against physicians disciplined by such groups. That question is not before us.

14 In his brief, appellee Curry contends that *Noerr* protection extends to the Tallahassee OB-GYNs' letter to Dr. Thompson at Jacksonville University Hospital in Jacksonville. His theory is that since the hospital is a county hospital operated by the Duval County Hospital Authority, the actions of the hospital staff and Dr. Thompson, head of the residency program, are "quasi-governmental". Dr. Curry does not, however, specify the kind of government action that the OB-GYNs were seeking. We do not think that any disciplinary action taken by Dr. Thompson would be any more governmental in nature than disciplinary action taken by the Tallahassee OB-GYNs. The appellees have cited no statutes that authorize Dr. Thompson to take or threaten to take action respecting the status of residents simply because those residents have conducted themselves in a manner inconsistent with private standards of professional conduct that have never been adopted by an agency charged by law with promulgating such standards. Moreover, the plaintiff Center may be complaining, that the Tallahassee OB-GYNs were seeking wholly unofficial action from Dr. Thompson. By the appellees' own admission, the letter was sent to Dr. Thompson simply as a means of communicating to the residents themselves, to whom the OB-GYNs had originally resolved to write, that the aftercare arrangements at the plaintiff's clinic were questionable.

15 We limit our examination to the materials on file at the time the trial court entered summary judgment and ignore twelve affidavits filed by the Center after the court's entry of its order.

judgment recognized that, absent the *Noerr* issue, "the evidence might allow sufficient inferences to submit the case to a jury for decision." The appellants' primary argument in support of summary judgment is that the inferences raised by the Center's pleadings and evidentiary materials cannot stand in the face of contrary evidence that the doctors were motivated solely by concern for the welfare of the clinic's abortion patients. They rely on our decisions in *Soloman v. Houston Corrugated Box Co., Inc.*, 5 Cir. 1976, 526 F.2d 389, *Scranton Construction Co. v. Litton Industries*, 5 Cir. 1974, 494 F.2d 778, and *Scott Medical Supply Co. v. Bedsole Surgical Supply*, 5 Cir. 1974, 488 F.2d 934. The appellants misapprehend the teaching of those decisions. Those cases involved claims that the decisions of certain firms not to do business with the plaintiffs were the products of conspiracies or concerted refusals to deal. In each case the defendants prevailed because the plaintiff, in the face of strong evidence that the decisions not to deal were motivated by sound business reasons, failed to adduce concrete evidence that the decisions were other than unilateral. This case differs significantly, for here there is no lack of evidence that the defendants acted jointly.

The appellees also contend that summary judgment is proper because the case is governed by the rule of reason and their conduct was reasonable as a matter of law. They cite our decision in *Hatley v. American Quarter Horse Ass'n*, 5 Cir. 1977, 552 F.2d 646, in which we held the self-regulatory actions taken by industries that necessarily require a high degree of interdependence

and cooperation should not be governed by rules of *per se* Sherman Act illegality absent "at least minimal indicia of anti competitive purpose or effect". *Id.* at 653. Critical to their attempt to bring this case within *Hatley's* warning against indiscriminate application of per se rules is the appellees' assumption that the Center's antitrust action against them is grounded *solely* on the defendants' attempts to impose certain standards of ethical and professional responsibility upon the plaintiff's operations. The *Hatley* case and the Supreme Court's decision in *Silver v. New York Stock Exchange*, 1963, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389, on which *Hatley* heavily relied, concerned attempts of antitrust plaintiffs to characterize the implementation of industry association standards as *per se* illegal boycotts. In *Silver* the plaintiffs' direct wire connections to the NYSE were terminated because of the plaintiffs' violations of the Exchange's regulations. In *Hatley* the plaintiff was denied registration of his colt as a quarter horse because the colt did not meet the association's breeding standards. In both cases the association action was tested by the rule of reason. The complaint in this case does allege that the defendants violated the Sherman Act by their acts in enforcing the standards of the profession. But it goes further. The complaint alleges intimidation and coercion of physicians. The Center contends that the defendants not only sought to enforce a certain standard for aftercare, but conspired to assure that the clinic would be unable to meet that standard. Thus, we cannot say that the entirety of this case should be governed by the rule of reason. To the

extent, moreover, that the Center relies on the theory that the imposition of the no-advertising and aftercare standards is itself an antitrust violation, we cannot say, at least on the present record, that the plaintiff has no hope of showing the "minimal indicia" of anticompetitive purpose that *Hatley* suggested might make *per se* treatment proper. Furthermore, a challenge to the defendants' efforts to enforce professional standards, even if governed by the rule of reason, could not be disposed of summarily, for triable fact issues remain as to the genuineness of the defendants' justification, the reasonableness of the standards themselves, and of the manner of their enforcement.

Appellees argue, finally, that at least partial summary judgment is proper because the plaintiffs have no evidence of damage, and because the Center cannot make the showing, requisite to recovery for attempts to monopolize, that the defendants were or are dangerously close to monopoly power. The doctors argue that the Center cannot hope to prove damages because the clinic's business has actually flourished since the commencement of the alleged conspiracy. We do not agree that summary judgment on the issue of damages would be warranted on the existing record. Although the income of the clinic may have increased during and after the conspiracy, as the doctors contend, that fact would no more preclude proof of damage than a decrease in income, without more, would establish the fact of damage. We have no assurance that the growth of the clinic's business was not retarded by the alleged actions of the defendants. Nor do we agree that summary judg-

ment as to the plaintiff's section 2 claim is in order. The allegations and evidence raise a genuine fact issue concerning the doctors' proximity to monopoly power. The OB-GYNs at Tallahassee Memorial were, prior to the opening of the clinic, the major, if not only, providers of abortion services in the Tallahassee area. The success of their alleged attempt to prevent other physicians from working at the clinic would have eliminated their only competition. We cannot say, at the present stage of this case, that the defendants were not dangerously close to possessing monopoly power.

Summary judgment of the Center's federal antitrust counts against the OB-GYNs must be vacated.[16]

IV

DEFENDANT PALMER

In its pretrial order of September 3, 1976, the trial court granted defendant Palmer's motion for summary judgment. The court's reasons were not set forth in the order, but an earlier memorandum of decision suggests that the court believed Dr. Palmer to be protected by the "state action" defense of *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The Center appeals that ruling, urging that there are triable issues

16 On appeal, the Center has urged for the first time the claim that the defendants' conduct amounted to an attempt to regulate the accessibility of abortion services in violation of patients' privacy rights under the *Roe v. Wade* line of decisions. This claim was never raised before the trial court, and we see no need to address it at this time.

of fact as to Palmer's role in the alleged conspiracy and as to whether his actions were "state action" within the meaning of the *Parker* doctrine.

A. *The Coercion and Conspiracy Issues.*

Dr. Palmer urges that, even apart from a possible *Parker* defense, the trial court's entry of summary judgment was correct because the Center has come forward with no evidence of conspiracy and because the evidentiary matter on file establishes that Palmer's conduct was not coercive.

Federal Rule of Civil Procedure 56(c) provides that summary judgment may be granted when affidavits, depositions, and other materials on file show "that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law". The Center's evidence of coercion consists of Dr. Palmer's telephone conversation with Dr. Whaley, Whaley's subsequent departure from the clinic, and the follow-up trip made by one of Palmer's investigators to the clinic. The objective facts, including the substance of Palmer's advice to Dr. Whaley, are largely undisputed. The crucial factual dispute concerns the characterization of Palmer's conduct. This involves elusive questions of intent and motive, the type of questions that, the Supreme Court has warned, should seldom be disposed of by summary procedures. *Poller v. Columbia Broadcasting System, Inc.*, 1962, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458. The Center's allegations and

evidentiary matter do raise triable issues concerning Palmer's intentions and the character of his words to Dr. Whaley, and the evidence adduced by Dr. Palmer does not decisively controvert the Center's version of the facts.

It suffices here to state Dr. Whaley's version of the telephone call. In his deposition Whaley recalled that Palmer advised him that it would benefit him to leave the clinic, inasmuch as the clinic was controversial and had questionable aftercare arrangements. Whaley ultimately left the clinic, he said, not "specifically" on Dr. Palmer's advice, but "because of the advice of several people and what I felt myself to be beneficial to me". Dr. Palmer points to this as establishing the absence of coercion. On the contrary, Whaley's account of the telephone conversation could be reasonably construed as suggesting that Palmer's call contributed to Whaley's decision to leave the clinic. The causation issue is surely not disposed of by Whaley's characterization of Palmer's advice as "helpful" and uncoercive. Nor does Dr. Whaley's account resolve issues concerning Dr. Palmer's state of mind. There are triable issues whether Dr. Palmer intended his communication as a subtle threat to Whaley's career or should reasonably have known that it would be construed as such, or whether Palmer simply intended, in all innocence, to give avuncular advice to the young physician. As in many antitrust cases, the conduct alleged takes its character from its context. Actions innocent and lawful in themselves become actionable

when undertaken pursuant to an unlawful conspiracy. *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914).

Palmer strenuously urges that the Center has no shred of evidence that he conspired with the other defendants. He argues that the Center has failed to set forth any theory of why he would have conspired. The only communications between himself and the other defendants, so far as the evidence shows, were the letter of complaint sent him by the OB-GYN Committee and his subsequent call to Dr. Mohammad reporting the results of his investigation. These communications, he says, evidence no agreement whatsoever. Thus, Dr. Palmer concludes, the plaintiff's allegations of conspiracy are unsupported by affidavits or depositions, and cannot stand in the face of Dr. Palmer's deposition answers to the contrary under our decision in *Saenz v. University Interscholastic League*, 5 Cir. 1973, 487 F.2d 1026.

This is not, however, a case of a plaintiff relying strictly on the strength of bare allegations, as in *Saenz*. The Center has set forth evidentiary matter and contends that the depositions and interrogatories permit the inference that Dr. Palmer conspired with the defendant physicians. It is common learning that summary judgment may be improper if the parties disagree about the inferences that may reasonably be drawn as to any material issue of fact. *Insurance Co. of North America v. Bosworth Construction Co.*, 5 Cir. 1972, 469 F.2d 1266, 1268; *Lighting Fixture & Electric Supply Co. v. Continental Ins.*

Co., 5 Cir. 1969, 420 F.2d 1211, 1213. The question presented, then, is whether the evidentiary matter adduced below supports a reasonable inference of conspiracy between Dr. Palmer and the other defendants. In addressing that question we must view the facts set forth in the materials in the light most favorable to the Center, the party opposing the summary judgment motion. *Adickes v. S. H. Kress & Co.*, 1970, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142; *Time, Inc. v. Ragano*, 5 Cir. 1970, 427 F.2d 219, 221. Applying these principles, we find that there remains a triable issue as to Dr. Palmer's participation in the alleged conspiracy.

The evidentiary matter before the district court showed only one communication between the OB-GYNs and Dr. Palmer that occurred prior to Dr. Palmer's conversation with Dr. Whaley — the doctors' letter of complaint. The character of Dr. Palmer's actions after receiving the Committee's request, viewed against the background of the controversy brewing in the Tallahassee medical community, can reasonably give rise to an inference that Dr. Palmer embraced the alleged plans of the other defendants.[17]

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17 We are aware that, as Dr. Palmer urges, an agreement to violate the law is the essence of conspiracy. *Joseph E. Seagrams and Sons, Inc. v. Hawaiian Oke Liquors*, 9 Cir. 1969, 416 F.2d 71, *cert. denied*, 1970, 396 U.S. 1962, 90 S.Ct. 752, 24 L.Ed.2d 755. We hold only that there is a triable issue as to whether Dr. Palmer and the other defendants arrived at some form of agreement. Palmer urges that he had no opportunity to conspire inasmuch as he never discussed the clinic with the other defendants before they sent the letter of complaint. Although it is true that the Center has cited no direct evidence of such a communication, and Dr. Palmer has denied that he spoke with the others before he called Dr. Whaley, we think the

Against the Center's largely circumstantial evidence of a conspiracy between Dr. Palmer and the other defendants stands Palmer's testimony that his advice to Dr. Whaley was inspired solely by his concern for the young physician's professional welfare. Our decisions have established that evidence of conspiracy consisting wholly of a series of inferences cannot stand against overwhelming evidence that the challenged action was taken unilaterally for sound business reasons. *See, e.g., Soloman v. Houston Corrugated Box Co., Inc.*, 5 Cir. 1976, 526 F.2d 389; *Scott Medical Supply Co. v. Bedsole Surgical Supply*, 5 Cir. 1974, 488 F.2d 934. We cannot say, however, that Dr. Palmer's evidence as to motive is so convincing that an inference of conspiracy could not reasonably be drawn. It is, concededly, not clear what personal stake Dr. Palmer might have had in a scheme such as the Center alleges here. But we reject Palmer's contention that an easily discernible motive is an essential element in a §1 conspiracy claim. The apparent absence of motive may be probative of a defendant's innocence, but it does not, of itself, preclude taking a case to the jury.

Center is entitled to try the issue to a jury. We note that prior to Dr. Palmer's visit to the clinic and his call to Dr. Whaley the OB-GYN Staff had on two or three occasions written to the Capitol Medical Society — of which Dr. Palmer is a member — complaining about the clinic and asking the CMS to take action regarding the clinic. Moreover, it is clear that Dr. Palmer did have an opportunity to discuss the clinic with the defendants prior to the follow-up visit by Dr. Palmer's investigator, Mr. McCollum. The Center complains that this follow-up visit could have had nothing to do with official BOME business because Palmer had "closed" the Whaley investigation and the BOME has no jurisdiction over medical institutions, as opposed to practitioners.

B. *The* Parker *Defense.*

The "state action" exemption from antitrust liability is generally said to have originated in *Parker v. Brown*, 1943, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, in which the Supreme Court held that an anticompetitive agricultural program established by California law was immune from Sherman Act attack. The Court found no basis in the language or history of the Sherman Act suggesting that the Act was designed "to restrain a state or its officers or agents from activities directed by its legislature". *Id.* at 350-51, 63 S.Ct. at 313. Antitrust liability cannot, therefore, be premised on anticompetitive market effects that are imposed by an act of government.

We have held that the acts of a subordinate state governmental entity are immune from antitrust challenge to the extent that they are "comprehended within the powers granted to it by the Legislature". *City of Lafayette v. Louisiana Power & Light Co.*, 5 Cir. 1976, 532 F.2d 431, 434, *aff'd*, 1978, 434 U.S. 811, 98 S.Ct. 1123, 55 L.Ed.2d 364. A plurality of the Supreme Court expressly approved the state action test that we st forth in *City of Lafayette. City of Lafayette v. Louisiana Power & Light Co.*, 1978, 98 S.Ct. 1123, 1137-38; *see also Bates v. State Bar of Arizona*, 1977, 97 S.Ct. 2691, 433 U.S. 350, 53 L.Ed.2d 810. Dr. Palmer therefore enjoys immunity to the extent that his conduct was within the scope of the authority granted to the director of the BOME by the Florida legislature. The scope of the agent's authority "may be demonstrated by explicit language in state

statutes, or may be inferred from the nature of the powers and duties given to a particular government entity". *Duke & Co. v. Foerster*, 3 Cir. 1975, 521 F.2d 1277, 1280.

Dr. Palmer is Executive Director of the Florida Board of Medical Examiners. The Board's powers derive from Florida's Medical Practice Act. The general purpose of the Act is to protect the public against improper or unqualified practice of medicine and from professionally irresponsible conduct by persons licensed to practice medicine. Section 458.11 of the Florida Statutes authorizes the Board to aid law enforcement officials in the enforcement of the Act and the prosecution of persons charged with violating it. The Board is empowered in its discretion to issue administrative warning letters to licensed physicians for "apparent violations" of the Act, and to require the registration of unlicensed physicians practicing medicine where such practice is authorized. Section 458.1201(1) empowers the Board to discipline physicians for engaging in unethical, immoral, or unprofessional conduct or practice, for maintaining professional association with a person who is in violation of the Act or of the Board's regulations, for assisting the unlawful practice of medicine, or for being removed, suspended, or disciplined by his peers within a professional medical association or review organization. The nature of the disciplinary action authorized is set forth in section 458.1201(3)(a). The Board may deny a physician's license application, revoke, withhold, suspend, or

restrict his license, or it may require him to submit to a variety of remedial or educational programs, and it may "[a]dminister a public or private reprimand."

We find nothing in the Medical Practice Act justifying summary judgment in Dr. Palmer's favor on the state action issue. The essence of the complaint against Palmer seems to be that, pursuant to a conspiracy, he used the prestige of his position to coerce Dr. Whaley into leaving the clinic. Aside from section 458.11(8)'s provision for administrative warning letters, the statute does not authorize the Board or its Director to use any sort of pressure or powers of persuasion to the end of causing a physician to cease and desist from engaging in practices that have never been adjudicated to be illegal or improper. Dr. Palmer's contention that the call was a private reprimand authorized by section 458.1201(3)(a) 3 is without merit. That provision authorizes the Board to enter "an order" of reprimand whenever it "finds any person unqualified or guilty" of any violation of subsection (1). Dr. Palmer acted entirely on his own in this matter; there was no formal finding of guilt and no "order" was entered by the Board. Nor was Dr. Palmer's action the exercise of whatever residual disciplinary power, if any, may be granted by section 458.1201. That section gives *the Board* authority to discipline a physician who, "after hearing, has been adjudged unqualified or guilty" of the practices set forth therein. Finally, Palmer's telephone call to Dr. Whaley cannot be construed as a form of "administrative warning letter", which under section

458.11(8) the Director may issue, in his discretion, for "apparent violations" of the Act. On this point, Dr. Palmer stands impeached by his own characterization of the Whaley call. In his deposition, Palmer stated that he told Dr. Whaley that "[t]his is a personal call to you concerning your activities in Tallahassee". Although Palmer's characterization of the call does not estop him from now arguing that the call was official business, it is certainly strong evidence that it was not. Moreover, Dr. Palmer informed both Dr. Whaley and Dr. Mohammad that he'd found no violations of the Act, either apparent or otherwise. This seems to us to defeat any contention that the call was an "administrative warning".[18]

Our ruling does not imply, however, that Dr. Palmer cannot in any eventuality avail himself of the state action defense. Our disposition of this appeal is dictated by the posture of the action. The theory of the plaintiff's case against Dr. Palmer is not yet entirely clear,

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18 We agree with Judge Thornberry's observation in his concurring opinion that Dr. Palmer is not foreclosed from demonstrating that his call to Dr. Whaley is comprehended by the authority granted him by the legislature. We hold only that the summary judgment granted in his favor cannot be sustained on the theory that the telephone call was an "administrative warning letter" within the meaning of section 458.11(8). We do not mean to imply that Dr. Palmer cannot ultimately show "from the nature of the powers and duties" granted him, *see Duke & Co. v. Foerster*, 3 Cir. 1975, 521 F.2d 1277, 1280, that his call was a form of activity that may fairly be characterized as official action because integral to the process by which the Board or its Director discharges responsibilities expressly given them by the legislature. The telephone call could come within the *Parker* exemption in the absence of express statutory authorization for it.

and our duty is simply to determine whether there is any conceivable theory of the case under which Palmer would not be entitled to *Parker* immunity. We hold that there is. We conclude that summary judgment was improperly granted in favor of defendant Palmer on the Sherman Act issues.

V

THE STATE LAW CLAIMS

The Center's complaint in this action contained two state law counts that were also summarily adjudicated in favor of the defendants.

A. *Interference with Contractual Relations.*

The Center complained that the defendant's actions amounted to tortious interference with the clinic's business relations with its physicians. Under Florida law the plaintiff is entitled to recovery upon showing (1) the existence of a businesss relationship (not necessarily one evidenced by an enforceable contract) under which the plaintiff has some legal rights; (2) the alleged tortfeasor's knowledge of the relationship; (3) the defendant's intentional interference with that relationship in a manner that is not legally justified or excused; and (4) damage to the plaintiff. *John B. Reid and Assocs., Inc. v. Jiminez*, Fla.App. 1965, 181 So.2d 575; *Smith v. Ocean State Bank*, Fla.App. 1976, 335 So.2d 641.

The district court granted summary judgment for the defendants on this issue. The court was of the opinion that, absent evidence that their conduct was "sham", the physicians' interference, if any, with the clinic's business relations would be justified by their statutory authority to report and investigate questions of medical ethics and professional responsibility. Judgment was granted because the court found the plaintiff's evidence of sham conduct to be insufficient.

The entry of summary judgment was erroneous. The district court's incorrect view that the core of the complaint goes to protected petitioning activity determined its approach to the plaintiff's tort count. We agree with the district court that petitioning activity is protected from state law liability as well as from federal antitrust liability. But, as we noted in Part III, much of the OB-GYNs' activity that the Center complains of is not protected petitioning activity. The doctors' complaint letter to the BOME cannot be made the basis of tort liability, but the other activity alleged is fair game. Whether the nonpetitioning activity amounts to tortious interference with business relations must be determined at trial. Assuming, without deciding, that the defendants' alleged concern for the public welfare would constitute adequate justification or excuse under Florida law, triable issues nonetheless remain as to the genuineness of the defendants' concern, and also as to the scope of the justification. If, as the Center alleges, the doctors' activities went beyond mere persuasion and included threats, we do not think that the

purity of their motivations would shield them from liability.[19]

Dr. Palmer contends that his actions are protected by Florida's doctrine of official immunity. As stated in *Schrank v. Bless*, 1976, M.D.Fla., 412 F.Supp. 28, 40, "[P]ublic executive officials, acting within their official capacity, are protected by a qualified immunity from liability, in the absence of demonstrated bad faith". Dr. Palmer is not entitled to summary judgment on the basis of this defense. Disputed fact issues remain as to whether Dr. Palmer's actions were within the scope of his official capacities, and, if so, whether he acted in good faith.

B. *The Florida Antitrust Statute.*

The Center's complaint contained counts under the Florida antitrust statute, §542.05 of the Florida statutes. That section, in broad outline, prohibits combinations formed for the purpose of restricting trade, fixing prices, or preventing competition in the provision of merchandise, produce, or commodities. The district court ruled that the Center's claim is barred by the holding of *Moles v. White*, Fla.App. 1976, 336 So.2d 427, *cert. dismissed*, Fla. 1978, 355 So.2d 516, that the statute does not reach the practice of medicine or the operation of hospitals. We affirm.

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19 The issue of justification or excuse is a complex one that must be decided by weighing numerous factors. *See* Restatement of the Law of Torts, §767 (1939).

The *Moles* decision is the sole authority on the applicability of §542.05 to the medical profession. The Florida Supreme Court has determined, in *Akey v. Murphy*, Fla. 1970, 238 So.2d 94, that another part of chapter 542, specifically section 542.12, governs the conduct of physicians. But that court has yet to address the question decided in *Moles*. *Erie* does not, of course, require us to follow blindly the appeals court's decision in *Moles*. We may depart from the authority of an intermediate state appellate court decision if there is "persuasive data that the highest court of the state would decide otherwise". *West v. American Telephone & Telegraph Co.*, 1940, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139; *Shelp v. National Surety Corp.*, 5 Cir. 1964, 333 F.2d 431. We turn to the data.

The statute prohibits anticompetitive conduct on the part of "any person", and might therefore seem to be of general application. The statute reaches "restrictions in trade or commerce", and bans all manner of fixing prices for merchandise, produce, or "commodities", which the statute defines in §542.01(2) to include "service or output of a service trade". The statute contains an express exemption for nonprofit agricultural cooperatives,[20] but none for hospitals or the medical profession.

Facial scrutiny, however, does not dispose of the question. Terms such as "commerce", "commodity", and "service" are so general that they tell us little about

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20 Fla.Stats. §542.05(5).

hard questions of exclusion or inclusion. Some effort must therefore be made to guess the intentions of the legislature that enacted the statute. Consideration of the statute's history suggests that it was not intended to reach the medical profession. Section 542.05 has its provenance in §5, chapter 6933 of the Laws of Florida, Acts of 1915. The statute survives in nearly its original form, the only major change being the addition, in 1941, of the proviso excepting agricultural and horticultural cooperatives from the statute's prohibitions. The statute thus antedates by at least half a century the modern view that the learned professions are "business" or "commerce" just like any other for-profit endeavor. In light of the former popularity of the view that the learned professions were not "trade", and therefore not subject to the federal antitrust laws, *see Atlantic Cleaners and Dyers, Inc. v. United States*, 1932, 286 U.S. 427, 52 S.Ct. 607, 76 L.Ed. 1204, a view that persisted in some courts until the Supreme Court's *Goldfarb* decision,[21] it seems unlikely that the 1915 Florida legislature thought that its anticombination statute comprehended the medical profession.

The Florida Supreme Court's ruling in *Akey v. Murphy*, Fla. 1970, 238 So.2d 94, does not support the appellant's case. The question in *Akey* was whether subsections (2) and (3) of §542.12 apply to physicians.

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21 *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc.*, 1970, 139 U.S.App. D.C. 217, 432 F.2d 650; *Greene v. Howard Univ.*, 1969, 134 U.S.App.D.C. 81, 412 F.2d 1128; *Riggall v. Washington County Medical Society*, 8 Cir. 1957, 249 F.2d 266.

Those provisions remove certain kinds of noncompetition covenants from the scope of the general prohibition of such covenants contained in subsection (1) of §542.12. The court in *Akey* reasoned that, because subsection (1) expressly applies to "professions", then subsections (2) and (3), which essentially modify subsection (1), also reach "professions" — including the medical profession. *Akey* does not hold or even imply that chapter 542 as a whole applies to the practice of medicine. The provision construed in that case was first enacted in 1953 and was, apparently, modeled upon similar statutes in other states. *Akey v. Murphy*, 238 So.2d at 96. Section 542.05 was enacted in 1915. It contains no reference to professions. That the Florida Supreme Court sees no conflict between the *Akey* and *Moles* decisions is suggested by its dismissal of the certiorari petition filed in *Moles* itself. Under Florida law a decision of an appellate court comes within the Supreme Court's constitutional certiorari jurisdiction if it conflicts with a decision of the Supreme Court or of an appeals court on the same point of law.[22] If *Akey* and *Moles* were irreconcilable the Florida Supreme Court would probably not have dismissed the certiorari petition as it did.

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22 Article V, §3(b) of the Florida Constitution states:

JURISDICTION.—The supreme court:

* * *

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

Because we are not convinced that the Florida Supreme Court would hold §542.05 applicable to the medical profession, we are bound by the authority of the state appellate court's *Moles* decision. We therefore affirm the district court's ruling dismissing the state antitrust law claim.

VI

CONCLUSION

Triable issues of fact underlying the Center's Sherman Act and common law tort claims against all the defendants remain. The judgments in favor of the defendants are REVERSED, and the cause is remanded for trial.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

THORNBERRY, Circuit Judge, specially concurring:

As is his custom, Judge Wisdom has written an able opinion for the court. I fully concur in the result and without wishing to detract from his opinion, I wish to add a few thoughts of my own.

Dr. Palmer insists that his call to Dr. Whaley was a form of "administrative warning" contemplated by the Florida statutory scheme. The majority holds that at this juncture, summary judgment is improper on the

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) issue. With this determination, I agree. I wish, however, to write briefly to emphasize that our court has not held that Palmer has no *Parker v. Brown* exemption.

The majority notes that summary judgment is improper on the *Parker* issue because: (1) Dr. Palmer announced to Dr. Whaley that his call was "personal" in nature, and (2) Dr. Palmer informed both Dr. Whaley and Dr. Mohammad that he had found no violation at the Center. I have no doubt that in the face of these facts, there remains a triable issue as to Dr. Palmer's motive in making the call. I eschew, however, the majority's characterization that this evidence is "strong" that Dr. Palmer was not acting within the scope of his authority when he made the calls. I would not be surprised to find that as a first step, such informal communications almost always precede a formal communication and official adjudication. In *City of Lafayette v. La. Power & Light Co.*, 434 U.S. 811, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978), the Supreme Court said that the *Parker* exemption does not depend on the ability "to point to a specific, detailed legislative authorization." Similarly, I do not think it is a requirement of *Parker v. Brown* that the official claiming the exemption must wear the robe and carry the mace before the exemption applies.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

OFFICE OF THE CLERK

MARCH 5, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-1924 — FEMINIST WOMEN'S HEALTH CENTER, INC., etc v. MAHMOOD MOHAMMAD, Et. Al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ Sally Hayward
Deputy Clerk

cc: Ms. Betty Owen Stinson
Mr. Steven Seliger
Mr. Kent Spriggs
Ms. Nadine Taub
Mr. B. J. Bradshaw
Mr. M. Stephen Turner
Mr. John C. Cooper
Mr. J. Lewis Hall, Jr.
Mr. Frank J. Santry
Mr. Michael Schwartz

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FEMINIST WOMEN'S HEALTH CENTER, :
INC., a non-profit corporation, ;
Plaintiff, :
vs. TCA 75-186
MAHMOOD MOHAMMAD, M.D., et al :
Defendants. :

MEMORANDUM OF DECISION
and
ORDER GRANTING SUMMARY JUDGEMENT

This case came on hearing on November 30, 1976, on motions for summary judgement by all defendants.

The plaintiff is engaged in the business of providing first trimester elective abortions in Tallahassee, Leon County, Florida. The defendants are Doctors Mohammad, Currie, [*sic*] Crane, Griner and Messer, who are obstetricians practicing in the Tallahassee area. Doctors Mohammad, Messer, and Crane provide first trimester abortions. Doctors Currie [*sic*] and Griner apparently choose not to provide abortion services on a regular basis, but do provide other obstetric and gynecological services in the Tallahassee community.

The amended and supplemental complaint filed September 10, 1976, alleges violations of §§1 and 2 of the

Sherman Act, 15 USC §§ 1, 2. Specifically, plaintiff charges that defendants combined and conspired to institute a group boycott against plaintiff and to fix prices for first trimester elective abortions in violation of §1 of the Sherman Act. Further, plaintiff charges that the defendants attempted in combination to monopolize women's health care and abortion services in the interstate market for which Leon County is the center, in violation of §2 of the Sherman Act. A separate allegation under §2 of the Sherman Act is made against defendant Mohammad charging that he individually attempted to monopolize abortion services in the interstate market for which Leon County is the center. Plaintiff has also alleged claims cognizable under the pendent jurisdiction of the court: violations of §542.05 *Fla. Stats.* and a claim under the common law of Florida asserting tortious interference with plaintiff's contractual relations with certain physicians heretofore employed by plaintiff.

1. *The Sherman Act Claims.*

The core, indeed the great bulk, of plaintiff's case against the defendants is based upon certain communications by the defendants and others to the Florida Board of Medical Examiners (B.O.M.E.), the Capitol Medical Society (CMS) and to one Dr. Thompson, head of the residency program of a Jacksonville hospital.[1] Plaintiff contends that in making these communications the defendant doctors were motivated by a desire to drive plaintiff's clinic out of business and thus eliminate it as a competitor in the first trimester abortion services market.

Defendants have asserted numerous affirmative defenses to plaintiff's claims, but the critical one here is their claim of immunity under the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference* v. *Noerr Motor Frieght, Inc.,* 365 U. S. 127 (1961) (hereinafter *Noerr);* *United Mine Workers v. Pennington,* 381 U. S. 657 (1965) (hereinafter *Pennington);* *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972) (hereinafter *Trucking Unlimited).* At the time the court considered plaintiff's motion for preliminary injunction in this case, a tentative determination was made that the *Noerr-Pennington* defense did not apply to the communications complained of by plaintiff, except to those communications by defendants to BOME. *Feminist Women's Health Center, Inc.* v. *Mohammad,* 415 F. Supp. 1258, 1268-69 (N. D. Fla., 1976). Thereafter, additional state law was cited to the court, and I concluded that my initial determination on that issue was no longer legally correct. By a memorandum of decision dated November 18, 1976, this court held that *Noerr-Pennington* did apply to defendants' communications with CMS and the staff of the Jacksonville hospital. *See also, Rush-Hampton Industries, Inc.* v *Home Ventilating Institute,* 419 F. Supp. 19 (M.D. Fla., 1976). As a result, plaintiff must meet a higher standard of proof than that originally thought appropriate. *Id.*

A. *The Standard*

The line of cases beginning with *Noerr* represents

an effort to strike the appropriate balance between the First Amendment and the anti-trust laws. *See, e.g., Noerr,* supra; *Pennington,* supra; *Trucking Unlimited,* supra. That balance has been struck by the courts paying great deference to the first amendment rights of an anti-trust defendant in cases where the gravamen of the complaint is that the defendant in effect misused or abused his right to petition government in furtherance of an anti-competitive scheme or course of conduct.[2] See *Noerr,* supra; *Pennington,* supra; *Trucking Unlimited,* supra.

Underlying that deference to first amendment rights is the realization that the right to freely petition government is the quick of the republic.

Under the *Noerr-Pennington* doctrine that deference translates as a practical matter into requiring a plaintiff who complains of conduct which essentially constitutes a petition by another to duly empowered authorities to bear an onerous burden if plaintiff is to succeed. In such cases, it is legally insufficient for the plaintiff to prove merely a prima facie case of conspiracy in restraint of trade or a conspiracy or attempt to monopolize. It is even legally insufficient for the plaintiff to clearly demonstrate proof of anti-competitive intent on the defendants' part. Such proof is insufficient because a defendant's right to petition his government is protected even if it springs from clearly anti-competitive motives. *Pennington,* supra.

In cases such as the one at bar, plaintiff must go

further and establish not only that the conduct was anti-competitive in intent and effect, but also that defendants' communications with governmental or quasi-governmental agencies were not attempts to invoke investigative-adjudicatory processes for legitimate reasons. See *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). Moreover, to insure protection for the right of petition, plaintiff must demonstrate such a state of affairs by an objective standard; that is, it must be shown that a pattern of baseless, repetitive claims exists, so pervasive that from its very magnitude the inference of abuse of the governmental process emerges. *See, e.g., Otter Tail Power Co.* v. *United States,* 410 U. S. 366 (1973); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508 (1972); *Rush-Hampton Industries, Inc.* v. *Home Ventilating Institute,* 419 F. Supp. 19 (M. D. Fla. 1976).

In the instant case there are facts which compound the need for deference to these defendants' rights of petition. From the outset this court has noted that this case involves the application of the anti-trust laws to a profession "which . . . intimately concerns the public health and welfare." *Feminist Women's Health Center, Inc.* v. *Mohammad,* 415 F. Supp. 1258, 1263 (N. D. Fla., 1976). The State of Florida has adopted the policy that the health and welfare of its citizens are best protected by making the medical profession largely self-disciplining. In furtherance of that policy the state has by statute authorized hospital staffs and medical associations to perform peer review of the ethics and

medical practices of their members. *Compare Feminist Women's Health Center, Inc.* v. *Mohammad,* supra, at 1268-69, with this court's memorandum of decision of November 18, 1976. Also, from the outset, this court has indicated that due deference must be given to the interests of the State of Florida in regulating the medical profession. *Feminist Women's Health Center, Inc.* v. *Mohammad,* supra at 1263. Peer group review necessitates the right to report suspected problems to a physician's peers without inordinate fear of incurring liability. Therefore, appropriate deference for that policy of peer group review requires that the court be all the more sensitive to the potentialities raised by the first amendment issues in this case.

It is recognized that so rigorous a standard may leave room for abuse by the medical profession. However, a lesser standard carries with it the potential for undue restraint of the right to petition. Given the choice, one must defer to the more fundamental right.

B. *The Plaintiff's Evidence*

Viewed in its most favorable light, the plaintiff's evidence is highly circumstantial. In a different context, not involving the concerns set forth above, the evidence might allow sufficient inferences to submit the case to a jury for decision. Under the standard enunciated above, however, the plaintiff's evidence simply does not measure up.

In evaluating the plaintiff's evidence for the

purposes of these motions, it is assumed *arguendo* that each defendant had a clearly established anti-competitive motive for his action. Further, it will be assumed that defendants' conduct did in fact intimidate certain physicians.[3] Assuming that, the plaintiff essentially complains of the following acts:

1. The defendants discussed whether to send a letter to B.O.M.E. complaining of possible defective medical practice at plaintiff's clinic. Such a letter was sent, causing an investigation which resulted in a finding of no illegality, but which did result in a comment by the B.O.M.E. investigator that plaintiff's aftercare arrangements were not the best. Later, defendants and others wrote a letter to Dr. Thompson, head of the residency program at a Jacksonville, Florida hospital, expressing their disapproval of what they considered to be the back-up arrangements made by certain of the residents under Dr. Thompson's supervision who were doing abortions at plaintiff's Tallahassee clinic.

Plaintiff points out, in this regard, that medical standards for aftercare involving first-trimester abortions are far from clear and that defendants did not thoroughly investigate the situation before complaining to B.O.M.E. and Dr. Thompson. Plaintiff strenuously contends that this allows the inference that defendants' concerns were not genuine. But that inference does not arise with sufficient clarity from the record to allow it to be drawn. The evidence indicates a bona fide difference of opinion regarding medically accepted aftercare standards. Given that difference of

opinion, the fact finder could not draw the inference that defendants' complaints were clearly frivolous. Futhermore, assuming that defendants' charges were in fact negligently made, that is insufficient under *Noerr-Pennington* to allow an inference that the doctors' actions were a mere sham. *Rush-Hampton Industries, Inc.* v. *Home Ventilating Institute,* supra.

2. The defendants discussed the prospect of inquiring of CMS whether it was ethical for a physician to associate with plaintiff in view of plaintiff's practice of advertising. Such inquiries were sent on two occasions. When CMS declined to render an opinion, the defendants and others passed a resolution at a meeting of the OB-GYN staff of Tallahassee Memorial Hospital (TMH), expressing their opinion that such conduct was unethical.

In regard to this conduct, plaintiff points to judicial decisions contrary to defendants' position and again charges that defendants' failure to move with deliberation and to investigate their position before taking action permits an inference that their complaints were not genuine.[4]

As previously observed, to merely show that the defendants made negligent charges is insufficient as a matter of law to prove a case under the sham exception within *Noerr-Pennington.*

3. Before the plaintiff's clinic opened, the OB-GYN staff of TMH in 1974 passed a resolution expressing disapproval of the then proposed clinic unless a member of the OB-GYN staff was associated with the clinic.

Plaintiff argues that this clearly demonstrates anticompetitive intent. Of course, the inference may equally be drawn that, as one of the defendants testified, the resolution indicated concern that a local physician with hospital privileges be involved to insure adequate aftercare. However, assuming as the court does for purposes of these motions, that the defendants were clearly motivated by a desire to ward off competition, this evidentiary point adds nothing to the strength of plaintiff's attempts to prove that defendants' later accusations against the plaintiff were totally baseless. That is the plaintiff's burden, irrespective of the monopolistic or good intentions of the defendants.

4. On October 6, 1975, CMS passed a resolution supporting and adopting the actions of defendants. Some of the defendants were present at the CMS meeting when the resolution was passed and voted for it.

Plaintiff contends that from this evidentiary fact the jury could properly infer that all prior contacts by defendants with CMS were tainted and could not have been genuine attempts to address a grievance to a regulatory body. With all due respect to plaintiff's

argument on this point, two other facts of record must be noted concerning this evidence. First, as plaintiff not only concedes but strenuously argues, CMS wears "two hats." It may exercise state-sanctioned disciplinary powers, or it may convene only as a private association. Second, the meeting and resolution complained of occurred after plaintiff had filed this suit. In this light, the clear inference is that the resolution was passed as a gesture of solidarity and in response to plaintiff's action. It is difficult to see how a reasonable inference of retroactive illegitimacy may be drawn regarding the prior relations between CMS and the defendants from this point of evidence.

The foregoing discussion analyzes the plaintiff's evidence on a point-by-point basis. However, the basic insufficiency of the plaintiff's case appears more clearly when plaintiff's evidence is viewed as a whole. Assuming the reasonableness and truth of every inference contended to arise in plaintiff's favor from the evidence, that evidence as a whole still does not demonstrate a pattern of baseless repetitive claims of such magnitude as to allow an objective inference of abuse of process. *Compare California Motor Transport Co. v. Trucking Unlimited, supra; Otter Tail Power Co. v. United States, supra, with Rush-Hampton Industries, Inc. v. Home Ventilating Institute, supra.*

Under the strictures imposed by the *Noerr-Pennington* rule, the plaintiff may not be allowed to go to the jury with what is essentially a case composed of

subjective inferences.[5]

C. *The Price Fixing Claim*

Apart from any failures of proof under the *Noerr-Pennington* doctrine, plaintiff's evidence does not establish a triable issue on the alleged conspiracy to fix prices. A price-fixing case requires proof of a tacit or explicit agreement to take a course of action aimed directly at the immediate objective of sustaining prices at a pre-determined level. *See United States* v *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940). Even assuming plaintiff's evidence would show some combined effort not protected by *Noerr-Pennington* to drive out competition which could possibly eventuate in price control ability, that would still not constitute a price-fixing case.

II. *The State-Law Claims*

A. *Claims under* §542.05 Florida Statutes.

Chapter 542, Florida Statutes, is the State of Florida's anti-trust law. The latest decision by the Florida Appellate Court clearly holds that Chapter 542 does not extend to the practice of medicine or to the rendition of hospital services. *Moles* v. *White,* 336 So.2d. 427 (2 DCA, Fla., 1976). Accordingly, plaintiff has no claim on the facts of this case under Chapter 542.

B. *Tortious Interference with Contractual Relations*

One of the elements which must be proved under

this claim is that the alleged interference with contractual relations is unjustified or without lawful purpose. *See, e.g.*, Anno., 26 ALR 2d 1227 (1952). The discussion above with respect to the authority of physicians in the State of Florida to report and investigate suspected ethical and medical practice irregularities clearly would supply justification under this claim.

The policies of the State of Florida in regard to self regulation of medical practice require of plaintiff an equally high degree of proof of sham conduct by these defendants under this cause of action as that imposed under the Sherman Act. The insufficiency of plaintiff's evidence on this issue need not be revisited here.

Accordingly, it is

ORDERED:

1. Summary judgment is granted in favor of all defendants on all claims.

2. The Clerk shall enter judgment accordingly.

3. This order shall be effective as of the date of the court's oral order granting summary judgment, November 30, 1976.

This 3rd day of December, 1976.

/s/

WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

FOOTNOTES FOLLOW THIS PAGE

Feminist Women's Health Center V. Mohammad, et al. TCA 75-186
FOOTNOTES to Memorandum of Decision and Order Granting Summary Judgment, dated December 3, 1976.

1. Plaintiff also intended to introduce evidence at trial which it contended would show that in 1972-73 some of these defendants acted in concert to gain absolute control of a different segment of the health care market. Plaintiff's stated purpose in offering such evidence was to show anticompetitive intent on the part of the defendants. But this proffer is not otherwise germane to the plaintiff's present claims under the Sherman Act. For purposes of considering defendants' motions for summary judgment, it will be assumed that the proffered evidence demonstrates an anti-competitive animus in the conduct of which plaintiff now complains.

2. Such is the essence of the plaintiff's case in this litigation.

3. Those inferences in fact are far from clear in the evidence presented by plaintiff.

4. With regard to defendants' contacts with CMS prior to October 6, 1975, and with regard to defendants' contacts with Dr. Thompson of the Jacksonville hospital, plaintiff further argues that the nature of those contacts allows the inference that defendants were not genuinely seeking to invoke the investigatory or adjudicatory powers of those bodies. Plaintiff points out that those bodies, in effect, "wear more than one hat." Plaintiff contends that, in order to be genuinely seeking adjudication or investigation from those groups, defendants would have had to approach them via the formal mechanisms of Florida's Administrative Procedure Act., Ch. 120, Fla. Stats. Plaintiff argued that since defendants failed to comply with the Act's procedures the defendants' efforts were not genuine attempts to petition those bodies in a quasi-governmental capacity. However, under the provisions of §120.52, *Fla. Stats.*, those bodies are not state or regional units of government expressly covered by the Act. Nor is the court able to discover any special act or existing judicial decision making such bodies subject to the Act. Of course, such bodies, when acting in a "quasi-governmental" capacity, would be required to comply with basic due process requirements. But no formalized or stylized method of bringing complaints exists or need exist under due process requirements. Viewed in this light, the petitioning of CMS for a ethics opinion, even if done ex parte, does

not carry the invidious inference argued by plaintiff. Indeed, such procedures are commonplace: witness request for ethics opinions from the Bar and requests for opinions from the Attorney General of the State of Florida.

Further, the fact that the letter to Dr. Thompson was sent to the head of the residency program undercuts the inference propounded by plaintiffs. In the absence of a formalized complaint porcedure a letter to the head of the appropriate program at a hospital is a reasonable means of stating a grievance or suspected impropriety.

5. If an objective core of evidence were present, plaintiff could, of course, buttress the inference with more subjective evidence.

JUDGEMENT ON DECISION BY THE COURT **CIV 32 (7-63)**

FOR THE
NORTHERN DISTRICT OF FLORIDA — TALLAHASSEE DIVISION

This action came on for (hearing) before the Court, Honorable United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff Feminist Women's Health Center, Inc., etc., take nothing, and that the action be dismissed on the merits.

Dated at Tallahassee, Florida _____, this 3rd Day of December, 1976.

MARVIN S. WAITS

_____

Clerk of Court

By _____

Deputy Clerk

Fla. stat. ch. 458.1201 *Denial, suspension, revocation of license; disciplinary powers.—*

(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any antecedent law who, after hearing, has been adjudged unqualified or guilty of any of the following:

(a) Failing to demonstrate the qualifications or standards for a license contained in this chapter or rules and regulations of the board in which proceeding the burden of proof shall be upon the applicant.

(b) Making misleading, deceptive, untrue, or fraudulent representations in the practice of medicine; employing a trick or scheme in the practice of medicine; practicing fraud or deceit in obtaining a license to practice medicine; or making a false or deceptive annual registration with the board.

(c) Being convicted of a felony in the courts of this state or any other state, territory, or country. Conviction as used in this paragraph shall include a conviction of an offense which if committeed in this state would be deemed a felony without regard to its designation elsewhere, or a criminal proceeding in which a finding or verdict of guilt is made or returned but the adjudication of guilt is either withheld or not entered thereon.

(d) Having his license to practice medicine revoked, suspended, or annulled or having other disciplinary action taken or his application for a license denied by the proper licensing authority of another state, territory, or country.

(e) Using alcohol, narcotics, or any other type of drug, chemical, or material which impairs his ability to practice medicine with reasonable skill and safety to patients.

(f) Advertising for or soliciting patients; or obtaining a fee or other thing of value on the representation that a manifestly incurable disease can be permanently cured.

(g) Violating a lawful rule or regulation promulgated by the board or violating a lawful order of the board, previously entered by the board in a disciplinary hearing.

(h) Engaging in any unethical, deceptive, or deleterious conduct or practice harmful to the public, in which proceeding proof of actual injury need not be established.

(i) Procuring, aiding, or abetting on the procuring of an unlawful termination of pregnacy.

(j) Knowingly maintaining a professional connection or association with any person who is in violation of this chapter or rules or regulations of the board or knowingly aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to this chapter or to rules and regulations of the board.

(k) Violating a statute or law of this state, any other state, or the United States (without regard to its designation as either felony or misdemeanor), which statute or law relates to the practice of medicine or in part regulates the practice of medicine.

(l) Being adjudged mentally incompetent by a court of competent jurisdiction, within or without this state. Such adjudication shall automatically suspend a license for the duration thereof unless the board orders otherwise.

(m) Being guilty of immoral or unprofessional conduct, incompetence, negligence, or willful misconduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice in his area of expertise as determined by the board, in which proceeding actual injury to a patient need not be established when the same is committed in the course of his practice, whether committed within or without this state.

(n) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material, or as a result of any mental or physical condition. In enforcing this paragraph the board shall, upon probable cause, have authority to compel a physician to submit to a mental or physical examination by physicians designated by it. Failure of a physician to submit to such examination when directed shall constitute an admission of the allegations against him unless the failure was due to circumstances beyond his control, consequent upon which a default and final order may be entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to

demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients.

(o) Being found liable for medical malpractice or any personal injury resulting from an act or omission committed or omitted by the person in his capacity as a physician licensed pursuant to this chapter.

(p) Being removed or suspended, or having disciplinary action taken, by his peers within any professional medical association, society, professional standards review organization established pursuant to s. 249F of Public Law 92-603, or similarly constituted professional body, whether or not such association, society, organization, or body is local, regional, state, national, or international in scope, or by being disciplined by a licensed hospital or medical staff of said hospital for immoral or unprofessional conduct or willful misconduct or negligence by the person in his capacity as a physician licensed pursuant to this chapter. Any body taking action as set forth in this paragraph shall report such action to the board within 30 days of its occurrence or be subject to a fine assessed by the board in an amount not exceeding $500.

(2)(a) For the purpose of subsection (1)(n), every physician licensed under this chapter who shall accept the privilege to practice medicine in this state shall, by so practicing or by the making and filing of annual registration to practice medicine in this state, be deemed to have given his consent to submit to a mental or

physical examination when directed in writing by the board and further to have waived all objections to the admissibility of the examining physicians' testimony or examination reports on the ground that the same constitute a privileged communication.

(b) In any proceeding under subsection (1)(n), neither the record of proceedings nor the orders entered by the board shall be used against a physician in any other proceeding.

(c) In any proceeding under subsection (1), the board may appoint one or more licensed physicians to act for the board in investigating the conduct or competence of a physician.

(d) There shall be no liability on the part of, and no cause of action of any nature shall arise against, the board, its agents, its employees, or any organization or its members identified in paragraph (1)(p) for any statements made by them in any reports or communications concerning an investigation of the conduct or competence of a physician.

(3)(a) When the board finds any person unqualified or guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following:

1. Deny his application for a license;

2. Permanently withhold issuance of a license;

3. Administer a public or private reprimand;

4. Suspend or limit or restrict his license to practice medicine for a period of up to 5 years;

5. Revoke indefinitely his license to practice medicine;

6. Require him to submit to the care, counseling, or treatment of physicians designated by the board;

7. Require him to participate in a program of continuing education prescribed by the board;

8. Require him to practice under the direction of a physician in a public institution, a public or private health-care program, or private practice for a period of time specified by the board.

(b) In conjunction with any of the foregoing, the board may make a finding of guilt but suspend imposition of judgment and penalty, or it may impose the judgment and penalty but suspend enforcement thereof and place the physician on probation, which probationary order may be vacated upon noncompliance.

(4) In its discretion, the board may restore and reissue a license to practice medicine, but, as a condition thereof, may impose any disciplinary or corrective measure which it might originally have imposed.

(5) The board shall report to the President of the Senate and the Speaker of the House of Representatives on February 1 of each year, beginning February 1, 1976, the status of the actions taken by the board in carrying out the responsibilities assigned to it under this section.

(6) The provisions of this section are enacted in the public welfare and shall be liberally construed so as to advance the remedy.

History.—s. 2, ch. 69-205; s. 12, ch. 75-9.

Supreme Court, U. S.
FILED
SEP 24 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-1799

MAHMOOD MOHAMMAD, M.D.,
CALVIN H. CURRY, JR., M.D.,
EDWIN D. CRANE III, M.D.,
J. HOWARD GRINER, M.D.,
H. HUTSON MESSER, M.D., and
GEORGE S. PALMER, M.D.,

Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION

KENT SPRIGGS
Spriggs & Henderson
324 West College Avenue
Tallahassee, FL 32301

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

MAHMOOD MOHAMMAD, M. D. et al.,
Petitioners,

versus

FEMINIST WOMEN'S HEALTH CENTER,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Feminist Women's Health Center, respectfully requests that this Court deny the petitions for writs of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 586 F.2d 530.

The Respondent would adopt the Opinion Below, Jurisdiction, Questions Presented, Statute Involved and Statement of the Case as presented in the Petitioners' Petitions for Writ of Certiorari.

REASONS WHY THE WRIT OF PETITIONER PALMER SHOULD BE DENIED

POINT I.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are in fact present.

Second, this issue is based on a misapprehension of applicable law. There is no legal requirement that Dr. Palmer be a competitor to be liable for participation in a conspiracy to violate the Sherman Anti-trust Act. *See, In re Multistate vehicle Air Pollution,* 481 F 2d 122 (9th Cir. 1973); *Checker Motors Corp. v. Chrysler Corp.,* 405 F. 2d 319 (2d Cir. 1968); *Travelers Inc. Co. v. Blue Cross,* 481 F. 2d 80 (3d Cir. 1973); *Loewe v. Lawlor,* 208 U.S. 274, 293-96 (1908).

Third, the Petitioner neglects to inform this Court that this issue was fully and specifically raised before the Court of Appeals in his petition for Rehearing En Banc filed January 8, 1979. Being fully appraised, the Fifth Circuit saw no reason to modify its opinion. Palmer Petition, p. 53a.

POINT II.

First, the only consideration governing review on certiorari reflected in Supreme Court Rule 19 and asserted by Petitioner Palmer is that this issue is of exceptional importance.

Second, the Court of Appeals did not *"completely abandon the appropriate legal concept of summary judgment in favor of an absolute requirement of trial by jury . . . . "* Palmer

Pet., p. 11. Rather, the Court of Appeals was mindful of the decisional law of this Court with regard to the impropriety of summary judgment where there are questions of intent and motive at issue.

> The Crucial factual dispute concerns the characterization of Palmer's conduct. This involves elusive questions of intent and motive, the type of questions that, the Supreme Court has warned, should seldom be disposed of by summary procedures. *Poller v. Columbia Broadcasting System, Inc.*, 1962, 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458.
>
> Palmer Petition at p. 36a.

There is a most unfortunate misrepresentation on page 10 of the Petition. The Petition states:

> This conclusion is reached in spite of the Court's findings that Dr. Whaley left the Center based upon the advice of several people and what he felt to be beneficial to himself. This conclusion is also reached despite the fact that the Court found that Dr. Whaley looked upon petitioner Palmer's advice as *"helpful"* and uncoercive. (37a)

In fact, the Court of Appeals stated:

> On the contrary, Whaley's account of the telephone conversation could be reasonably construed as suggesting that Palmer's call

> contributed to Whaley's decision to leave the clinic. The causation issue is surely not disposed of by Whatley's characterization of Palmer's advice as *"helpful"* and uncoercive. Nor does Dr. Whaley's account resolve issues concerning Dr. Palmer's state of mind.
>
> Palmer Petition at p. 37a.

POINT III.

This Court's decision in *Butz v. Economou*, 98 S. Ct. 2894 (1978), changed no rule of law that has any bearing on this Petition for Writ of Certiorari. *Butz* deals with the personal immunity of federal officials in the Executive Branch from claims for damages arising from their violation of a citizen's constitutional rights in the context of an administrative proceeding.

Absolute immunity is available only to officials when exercising a judicial, prosecutorial or legislative function during the course of the administrative proceedings. *See also, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 99 S. Ct. 1171, 1179, n. 30 (1979).

The *Parker v. Brown*, 317 U.S. 341 (1943), immunity concept is totally unrelated and based on differing considerations than the *Butz* immunity rationale.

The Court of Appeals was mindful of immunity issues in its opinion. The argument on page 13 of the Petition seriously misrepresents the ruling of the Court of Appeals, because it fails to disclose any of the panel's thoughtful analysis reflect-

ed in the opinion. See Petitioner Palmer's Pet., pp. 41a-45a. There is careful analysis of the statutory authority enjoyed by Defendant Palmer, Pet., pp. 42a-44a.

Most notably, the Petitioner fails to disclose his own sworn testimony to this Court:

> . . . Dr. Palmer stands impeached by his own characterization of the Whaley call. In his deposition, Palmer stated that he told Dr. Whaley that *"[t] his is a personal call to you concerning your activities in Tallahassee."* Although Palmer's characterization of the call does not estop him from now arguing that the call was official business, it is certainly strong evidence that it was not.
>
> Palmer Petition, p. 44a.

CONCLUSION

Essentially, Petitioner Palmer has not presented any question to this Court worthy of granting certiorari. There has been no demonstration of why it is necessary or important for the lower court decision to be reviewed by this Court, and therefore, the Petition should be denied.

REASONS WHY THE WRIT OF PETITIONERS MOHAMMAD ET AL. SHOULD BE DENIED

Point I.

First, none of the considerations governing certiorari review by this Court as reflected in Rule 19 on the Supreme

Court Rules are cited by the Petitioners, and in fact, none are present.

Second, read most favorably for the Petitioners, the Petition merely creates an *intra*-circuit decisional conflict. If this conflict did exist, it would be appropriately resolved by the United States Court of Appeals for the Fifth Circuit. See Rule 35, Federal Rules of Appellate Procedure; Local Rule 12, United States Court of Appeals for the Fifth Circuit. Obviously, the Fifth Circuit did not find any conflict with its prior pronouncements as it denied Petitioners' Petition for Rehearing En Banc.

Third, how subject matter jurisdiction under the Sherman Act, Title 15 U.S.C. § 1, is determined necessarily means:

> [t]here is no bright line dividing cases in which the effect upon interstate commerce is sufficient to permit Congress to prohibit particular anticompetitive activity under the commerce clause from those cases in which it is not sufficient. In this area perhaps more than in most, each case must turn on its own facts. *Rasmussen v. American Dairy Ass'n.*, 472 F. 2d 517, 526 (9th Cir. 1973), *cert. denied*, 412 U.S. 1950 (1974)
>
> *St. Bernard Gen. Hosp., Inc. v. Hospital Service Assn.*, 510 F. 2d 1121, 1126 (5th Cir. 1975).

All the evidence in this regard having been previously adduced and found to support Sherman Act jurisdiction, it is clear that this Court will not grant certiorari to review evidence or inferences drawn from that evidence. *General Talking Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175 (1938).

Fourth, the Fifth Circuit found it unnecessary to resolve a conflict over whether the receipt of Medicaid payments by the Respondent should have been considered by the district court as a proper component of the Respondent's interstate commerce connections. Mohammad et al, Petition, p. 16a, n.2. It is clear that these moneys, considered alone or as one of the "*combination of factors,*" *Hospital Building Co. v. Trustees of Rex hospital,* 425 U.S. 738 (1976), can be the basis for Sherman Act subject matter jurisdiction. *See, Alabama Optometric Association v. Alabama State Board of Health,* 379 F. Supp. 1332 (M.D. Ala. 1972); *Zamiri v. William Beaumont Hospital,* 430 F. Supp. 877 (E.D. Mich. 1977); *DeGregorio v. Segal,* 443 F. Supp. 1257 (E.D. Pa. 1978).

POINT II.

First, the Petitioners allege that the Fifth Circuit's decision directly conflicts with *Gulf oil Corp. v. Copp Paving Co., Inc.,* 419 U.S. 186 (1974). However, the substantive statute in *Gulf Oil* was the Clayton Act, Title 15 U.S.C. § 13 (a), which included a separate and distinct minimal jurisdictional basis, Title 15 U.S.C. §§ 14 and 18, and which is entirely different from § 1 of the Sherman Act. In fact, the history of the case shows that the district court dismissed the Sherman Act claim as well as the Clayton Act count. The appeals court reversed as to both, 487 F. 2d 202 (9th Cir. 1973). Only the Clayton Act cause of action reached this Court for decision. The determination by this Court specifically drew the distinction between these two anti-trust causes of action. 419 U.S. 186, 194-97. Therefore, no conflict can exist.

Second, the Fifth Circuit did not create a *"novel"* jurisdictional standard for Sherman Act antitrust cases. The language used by the Fifth Circuit that the Petitioners complain of is the accepted legally sufficient test. *See, Burke v. Ford,* 389 U.S. 320 (1967). *Doctors, Inc. v. Blue Cross of Greater Philadelphia,* 490 F. 2d 48 (3d Cir. 1973), stated:

> The Court ends its inquiry when it has satisfied itself that the logical and therefore probable effect of the alleged act is to reduce the flow of goods in interstate commerce.

See also, Boddicker v. Arizona State Dental Assn., 549 F.2d 626, 629, n. 4 (9th Cir. 1977).

As the citation indicates, the cases cited by the Fifth Circuit are merely illustrative of the legal concept. This is, of course, in further recognition of the unique character of each factual situation when a federal court determines the existence of Sherman Act subject matter jurisdiction.

POINT III.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they in fact present.

Second, even if the Fifth Circuit had erred, which it did not, the case would not be appropriate for granting of certiorari because the Florida statute at issue, Section 458.1201 (1)(p), Fla. Stat. 1977, is esoteric, and the application of *Noerr-Pennington* to its provisions is not *"an important issue of federal law which has not been, but should be, settled by this court . . . ."* Supreme Court Rule 19.

The Florida Medical Regulation Scheme

The *only* public attribute of medical societies and hospitals in the statewide regulatory framework is their responsibility to report any disciplinary action they may take to the state Board of Medical Examiners. As the Fifth Circuit noted, the existence of these reports in no way mandates any action or even process by the Board of Medical Examiners. Mohammad et al Pet., pp. 29a-30a.

The president of the medical society stated that *"my assumption would be that it's a private organization."* A769; D#365 at 17 [1]:

> He further testified as to the informality of CMS [Capital Medical Society] internal procedures (A771, 772 and 777, 778; D#365 at 19-20 and 45-46). Wood also stated that there is no formal relationship between CMS and BOME [Board of Medical Examiners] and in fact had no communication with the BOME regarding the operation of CMS (A775; D#365 at 23).
>
> Diane Pickett, Executive Secretary of CMS, confirmed the private nature prespective of the CMS hierarchy (A389, 390; D#235 at 6-7).
>
> For an extensive discussion of the role of medical societies in restricting services and promoting anti-competitive policies, see Amicus Brief of American Public Health Ass'n. et al, pp. 25-29.
>
> Appellant's Brief, p. 42.

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1. Citations are to Appellant's Brief in the Fifth Circuit – A - Appendix; D - Depositions not included in Record proper.

Any intimation that this analysis is not correct raises other grave issues which the Court of Appeals did not have to reach. If the Legislature intended to confer public or quasi-public status on professional medical organizations or hospital staffs through the passage of Section 458.1201 (1)(p), such was an unconstitutional delegation of power under Article III, Section I, Florida Constitution. See Appellant's Brief, pp. 44-46. The statute fails to establish any procedural safeguards. The Florida Constitution mandates that such administrative functions be exercised only by duly commissioned officers. *Dade County v. State of Florida,* 116 So. 72 (Fla. 1928). The Court of Appeals did not have to reach this question.

An even more serious shortcoming of the defense is that the kinds of communications made by the Defendants to the various medical bodies were not the kinds of communications protected by *Noerr-Pennington.* Appellant's Brief, pp. 46-51. The Court of Appeals did not have to reach this question.

Additionally, the conspiracy between the OB-GYN defendants and the Capital Medical Society precludes *Noerr-Pennington* protection for communications with that body. Appellant's Brief, pp. 51-53. The Court of Appeals did not have to reach this question.

Lastly, even if the *Noerr-Pennington* analysis of the Petitioners were correct, the summary judgment would have to be reversed because there were so many triable issues of fact on which the jury could find sufficient evidence of proof of the anti-trust conspiracy. Appellant's Brief, pp. 35-38. The Court of Appeals did not have to reach this question.

The formulation of Group Communication

This point is *de minimus.* In no way did it control the result.

This point is a classic case of taking a one-sentence statement in an opinion out of an extremely complex factual setting and crying *"wolf."* The petitioners cite to no specific discussions for which they seek protection. The reason for this strategy is clear. There is a very large body of evidence of actual conspiratorial activity by the Petitioners. From this concerted activity over a year and a half emerged (a) one single communication to the Board of Medical Examiners (arguably protected), (b) several communications to bodies correctly held by the Court of Appeals not to be protected, but (c) a preponderant majority of communications and coercions which were not protected even under the Petitioners' most extreme theories.

Rather than burden this response with what would necessarily be a very long factual recitation, with the Court's permission, we will merely cite to certain portions of the Brief of the Appellant in the Court of Appeals. The Statement of Facts is from pages 3 to 28. Pages 35-38 contain an analysis showing that the great bulk of the discussions were held prior to any *"petitioning"* and that it was these, certainly not the one arguably protected petition, that visited the damage on the Respondent Feminist Women's Health Center.

POINT IV.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they argued.

In the context of the instant case, the rule of law on which the Petitioners complaint constitutes (to the extent one can quantify) perhaps 5% of the overall evidence of conspiracy to restrain trade.

The position of the Court of Appeals (Mohammad et al. Petition, p. 24a) is abundantly correct. The district court took one possible configuration of proof of sham from this Court's opinion in *Otter Tail Co. v. United States,* 410 U.S. 366 (1973) and held, contrary to this Court's earlier opinion in *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), that the *Otter Tail* configuration of proof was the only one availing of the plaintiff seeking to prove *"sham."* The Court of Appeals noted simply and correctly that proof of a pattern of repetitive, baseless claims is not essential to proof of sham.

The only error of the Court of Appeals on this point is one which inured to the *benefit* of the Petitioners. The Court should have ruled that because the OB-GYN Defendants were conspiring with the Executive Director of the Board of Medical Examiners, no *Noerr-Pennington* defense could be interposed, regardless of sham. This point was raised in the Appellant's Brief, pp. 51-53.

In *California Motor Transport, supra,* the Court indicated certain circumstances under which *Noerr-Pennington* would not apply:

> *. . . Conspiracy with a licensing authority to eliminate a competitor may also result in an anti-trust transgression. Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707, 82 S.Ct. 1404, 1414, 8 L. Ed. 2d 777; *Harman v. Valley National Bank,* 339 F. 2d 564, (CA 9 1964).
>
> 404 U.S. 508, 513 (emphasis added).

Accord, *Duke & Co. v. Foerster,* 521 F. 2d 1277 (3d Cir. 1975).

In *Continental Ore Co. v. Union Carbide & Carbon Corp., supra,* this Court rejected the claim of *Noerr-Pennington* protection for communications of private defendants with a defendant co-conspirator Electro Met which exercised exclusive purchasing agent for vanadium for the Canadian Government. See also *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961).

The Court of Appeals did not reach this issue.

POINT V.

First, none of the considerations governing review on certiorari reflected in Supreme Court Rule 19 are cited nor are they in fact present.

This is a frivolous point.

The economic realities of the situation are clear. Prior to the coming of the Health Center in the spring of 1974, the Defendant doctors and their OB-GYN colleagues, who are named as non-defendant co-conspirators, did have monopoly power over first trimester abortions. The Health Center did perform more abortions than the Defendant doctors, but unlike the Defendants, it was in a peculiarly vulnerable posture in the market. Because the Plaintiff is a non-profit corporation, it cannot perform any abortions without a licensed physician. The Defendant doctors succeeded in pressuring out Drs. Mc Williams, Whaley and Rhett.

Had the Health Center at any time failed to gain another doctor, the Defendant doctors and their OB-GYN colleagues would have again enjoyed monopoly power. Thus, there is clearly a *"dangerous probability"* of monopolistic success.

CONCLUSION

Essentially, petitioners in both petitions have not presented any question to this Court worthy of granting certiorari. There has been no demonstration of why it is necessary or important for the lower court decision to be reviewed by this Court, and therefore, the petition should be denied.

Respectfully submitted,

KENT SPRIGGS
Spriggs & Henderson
324 West College Avenue
Tallahassee, FL 32301

Attorneys for Plaintiff/Respondent
Feminist Women's Health Center

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Respondent's Brief in Opposition were mailed to the following persons this 21st day of September 1979.

KENT SPRIGGS

Mr. Murray Wadsworth & Mr. Stephen Turner
Thompson, Wadsworth, Messer & Turner
Post Office Box 1876
Tallahassee, FL 32302

Mr. Dexter Douglass & Mr. John C. Cooper
Douglass, Davey & Cooper
Post Office Box 1674
Tallahassee, FL 32302

Mr. J. Lewis Hall, Jr.
Hall & Booth
Post Office Drawer 840
Tallahassee, FL 32302

Mr. E. Harper Field & Mr. Frank J. Santry
Kenn, O'Kelley, Field & Ellis
Post Office Box 1879
Tallahassee, FL 32302

Mr. Michael I. Schwartz
201 Ellis Building
1311 Executive Center Drive
Tallahassee, FL 32301

Ms. Betty Owen Stinson
517 East College Avenue
Tallahassee, FL 32301

Mr. Joseph J. Levin, Jr.
Ms. Pamela S. Horowitz
Southern Poverty Law Center
1001 South Hall Street
Montgomery, AL 36101

Ms. Nadine Taub
175 University Avenue
Newark, NJ 07102

Ms. Joan Friedland
Women's Rights Litigation Clinic
Rutgers Law School
172 University Avenue
Newark, NJ 07102

B. J. Bradshaw
Fulbright & Jaworski
800 Bank of the Southwest Building
Houston, TX 77002

see

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